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THE SACCO-VANZETTI CASE



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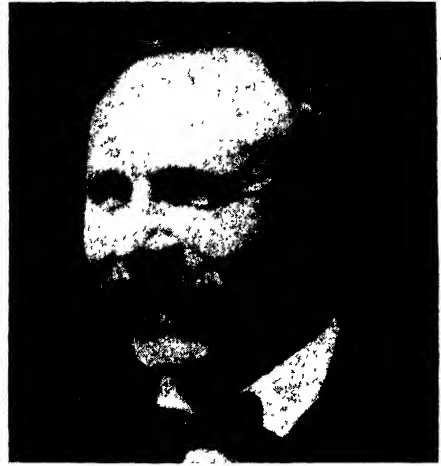


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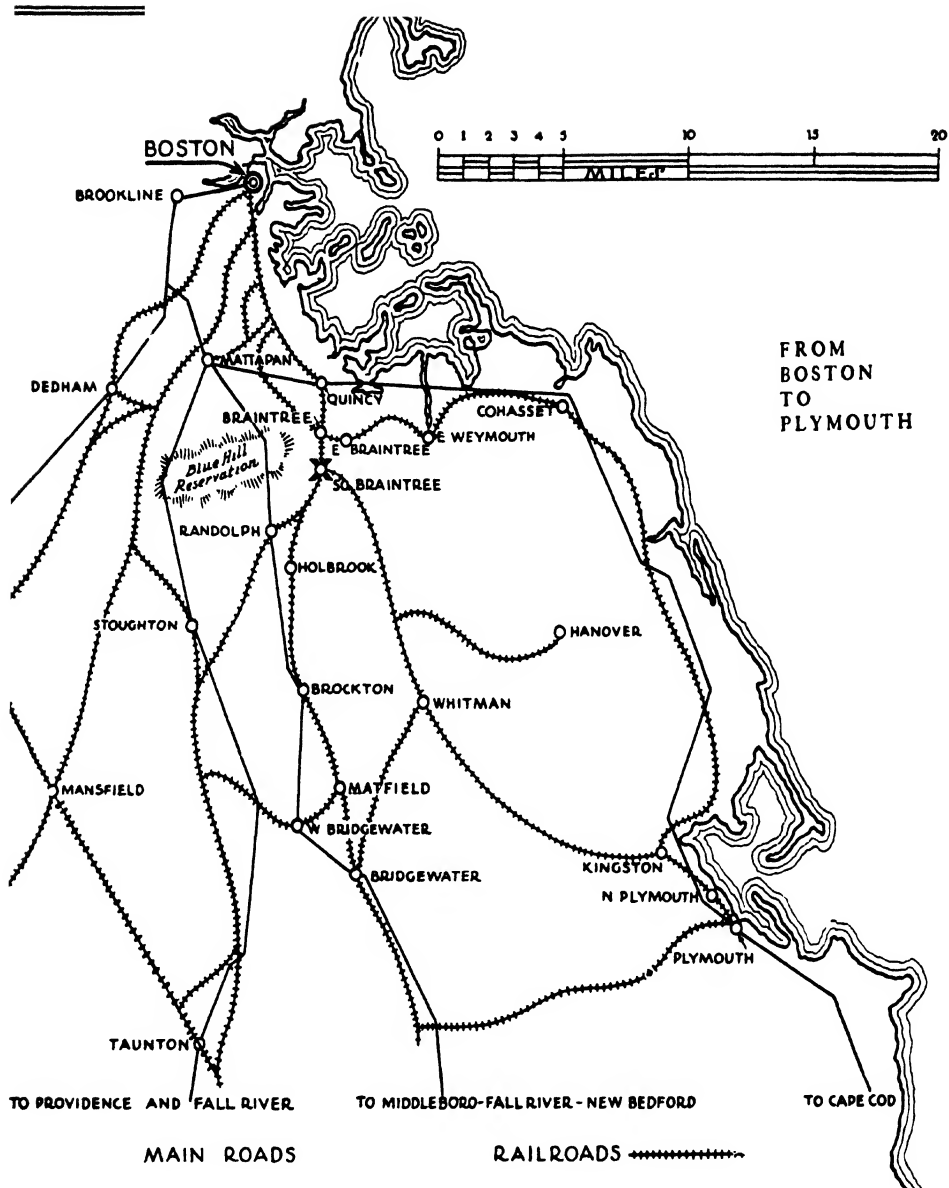
NICOLA SACCO



BARTOLOMEO VANZETTI



JUDGE WEBSTER THAYER



THE SACCO-VANZETTI CASE

BY
OSMOND K. FRAENKEL
of the New York Bar

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FOREWORD

In our foreword to *American Trials*, we stated that the series would be marked by two characteristics: presentation of the actual court records so that, as closely as possible, the trial of the case could be reenacted and the legal questions raised could be accurately presented; an introduction designed to give the case its perspective, its background and its mood. The volumes thus far published have been cast in this mould. Not so this volume.

It is because of the recent publication of the Court record in the Sacco-Vanzetti case by the house of Henry Holt Company that we here depart from our plan. That publication has made the original (and practically the complete) record available. Hence a repetition, even *in parvo*, would serve no useful purpose. Yet we have continued to feel that the Sacco-Vanzetti case deserves a place in this series. It would be a pity, we thought, to relegate to the exclusive benefit of the curious of future generations the opportunity for forming an opinion on a subject of such public interest. We have realized too how desirable it is that the public should have access to a single volume account of the case. Hence foreign though the form of this book may be to the specific plan of the series, we are glad to adopt this book as one of the *American Trials*.

SAMUEL KLAUS, *Editor*
UNDERHILL MOORE
JAMES N. ROSENBERG
Consulting Editors

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PREFATORY NOTE

All references in this volume are to the publication of the record by Messrs. Holt & Co. As the pagination of the first five volumes of the Holt issue is consecutive the volume of the reference has not been noted. For the convenience of readers the first page of each of the volumes follows: I, 1; II, 1093; III, 2267; IV, 3479; V, 4360. Because Volume VI has independent pagination all references to it are indicated by an asterisk.

Included are plans of the scene of the crime and of the surrounding country. The first is a simplified tracing of the one used at the trial and reprinted in Volume IV of the Holt record. Although a plan of the surrounding country was used at the trial it was not reprinted. A tracing has, therefore, been made from maps of the United States Geological Survey on which the course of the car after the shooting is indicated as accurately as the testimony permits. On both plans the approximate location of the witnesses has been marked. The principal places which figure in the story are indicated on a skeleton map.

I wish to express my thanks for valuable suggestions to the editors and to numerous friends, and especially to my wife for her constant assistance in the composition of this book.

O. K. F.

LIST OF ILLUSTRATIONS AND MAPS

GOVERNOR FULLER'S ADVISORY COMMITTEE	} <i>Preceding title page</i>
NICOLA SACCO AND BARTOLOMEO VANZETTI	
JUDGE WEBSTER THAYER	
MAP—FROM BOSTON TO PLYMOUTH	
MAP—THE NEIGHBORHOOD OF THE CRIME	<i>facing page 342</i>
MAP—THE COURSE OF THE ESCAPING BANDITS	<i>facing page 534</i>

CHRONOLOGY

1919

- November 22nd, *Theft of Buick car in Needham.*
December 22nd, *Theft of number plates used at Bridgewater.*
December 24th, *Attempted hold-up in Bridgewater.*

1920

- January *Theft of number plates used at South Braintree.*
April 15th, *Murders at South Braintree.*
April 17th, *Inquest at Quincy with regard to these murders.*
April 17th, *Discovery of Buick car in Manley woods.*
April 20th, *Interview of Boda by police.*
April 25th, *Vanزetti's trip to New York.*
April 29th, *Vanزetti's return to Plymouth.*
May 2nd, *Meeting in Boston of Sacco, Vanزetti and others.*
May 3rd, *Death in New York of Salsedo.*
May 5th, *Visit of Sacco, Vanزetti, Boda and Orciani to Johnson house, followed by arrest of Sacco and Vanزetti.*
May 6th, *Arrest of Orciani.*
May 6th, *Interview of Sacco and Vanزetti by District Attorney Katzmann.*
May 18th, *Preliminary hearing against Vanزetti in relation to the Bridgewater case.*
May 26th, *Preliminary hearing at Brockton against Sacco.*
June 11th, *Indictment of Vanزetti for Bridgewater hold-up.*
June 22nd to July 1st, *Trial at Plymouth of Vanزetti for Bridgewater hold-up.*
August 16th, *Sentence of Vanزetti for Bridgewater hold-up.*
September 11th, *Indictment of Sacco and Vanزetti for South Braintree murders.*

1921

- May 31st to July 14th, *Trial of Sacco and Vanزetti at Dedham.*
November 5th, *Motion for new trial as against the weight of evidence argued before Judge Thayer.*

November 8th,
December 24th,

*First supplementary motion filed (Ripley).
Motion for new trial as against the weight of evi-
dence denied.*

1922

May 4th,

*Second supplementary motion filed (Gould and
Pelser).*

July 22nd,

Third supplementary motion filed (Goodridge).

September 11th,

Fourth supplementary motion filed (Andrews).

1923

April 30th,

Fifth supplementary motion filed (Hamilton).

October 1st,

Supplement to first motion filed (Daly).

October 1st to 3rd,

*{ All five supplementary motions argued before
Judge Thayer.*

November 1st, 2nd, 8th,

November 5th,

Proctor motion filed.

1924

October 1st,

Decisions by Judge Thayer denying all motions.

1925

November 18th,

*Medeiros statement received by Sacco in Dedham
prison.*

1926

January 11th to 13th,

*Argument of appeal of Sacco and Vanzetti from
conviction and from denial of first, second and
fifth supplementary motions.*

March 31st,

*Conviction of Medeiros reversed by Supreme Ju-
dicial Court.*

May 12th,

*Conviction of Sacco and Vanzetti affirmed by Su-
preme Judicial Court.*

May 15th to 20th,

Second trial of Medeiros.

May 26th,

Motion based on Medeiros' statement filed.

September 13th to 17th,

Medeiros motion argued before Judge Thayer.

October 23rd,

Decision by Judge Thayer denying motion.

1927

- January 27th and 28th, *Appeal from denial of Medeiros' motion argued before Supreme Judicial Court.*
- April 5th, *Denial of motion affirmed.*
- April 9th, *Sentence imposed by Judge Thayer on Sacco and Vanzetti.*
- May 3rd, *Petition for clemency addressed to Gov. Fuller.*
- June 1st, *Advisory Committee appointed by Gov. Fuller.*
- July 11th to 21st, *Hearings held before Advisory Committee.*
- August 3rd, *Decision by Governor Fuller denying clemency.*
- August 6th, *Motion filed for revocation of sentence.*
- August 6th, *Petition filed for writ of error.*
- August 8th, *Motion denied by Judge Thayer.*
- August 8th, *Petition denied by Judge Sanderson.*
- August 10th, *Petition for writ of habeas corpus denied by Justice Holmes of the United States Supreme Court, and by Judge Anderson of the United States District Court.*
- August 16th, *Exceptions to denial of motion and petition argued in Supreme Judicial Court.*
- August 19th, *Exceptions overruled by Supreme Judicial Court.*
- August 20th, *Petition for writ of habeas corpus denied by Judge Morton of the United States Circuit Court of Appeals.*
- August 20th, *Petition for stay and extension of time in which to apply to the United States Supreme Court for writ of certiorari denied by Justice Holmes of the United States Supreme Court.*
- August 22nd, *Similar petition denied by Justice Stone of the United States Supreme Court.*
- August 23rd, *Sacco and Vanzetti and Medeiros executed.*
- October 3rd, *Petition for writ of certiorari dismissed by consent in the Supreme Court of the United States.*

THE SACCO-VANZETTI CASE

A BRIEF SURVEY

INTEREST in the guilt or innocence of an accused person or in the adequacy of the legal machinery employed in determining a problem of this nature reaches at times the intensity of a social question. The conscience of a community, sometimes that of the whole civilized world, may feel itself under such circumstances involved in the fate of a person otherwise obscure; and partisanship may run so high that in the locality whose courts are under scrutiny the case at issue can hardly be discussed with reason.

Not since the time of the Dreyfus affair has international feeling risen to so high a peak as it did in the case of Sacco and Vanzetti. Throughout Europe and America radical and conservative opinion locked horns over this conviction and the proceedings which followed it. To no single outstanding factor in the case can be attributed this world-wide excitement, but consideration of the many elements which colored the full story, familiar now to large numbers of people, throws light on why the case aroused the almost unprecedented emotion it did.

The crime for which the two radicals went after seven years to the chair was the seizure in the streets of South Braintree, Massachusetts, on April 15th, 1920, of a pay roll amounting to \$15,776.51 and the brutal murder of the men who had had it in charge. After fruitless attempts made in the courts of Massachusetts to save the accused men an appeal for clemency was submitted to Governor Fuller. The suspense pending his deliberations and those of the Advisory Committee he had appointed reached its apex with the announcement that a decision would be rendered on August 3rd, 1927. Upon its publication letters and petitions poured into Boston and Washington. In various cities of Europe the United States legations had to be put under guard. In others police reserves were called out to watch for violence at mass meetings held in condemnation of the decision. Everywhere parades and protests sprang up. Bombs, which the press laid at the door of sympathizers with the defendants, were thrown in the New York subway and at the house of one of the jurors in the case. In Uruguay, Paraguay and Argentina the labor elements called general strikes. Newspapers in London and Paris deplored the outcome of the affair and in Germany twelve prominent lawyers prepared and signed a statement which decried a death sentence imposed after a judicial delay of seven years. In Morocco, Panama and Geneva popular demonstrations took place, and violence, both attempted and accom-

plished, was reported from Sydney, Montevideo, Bucharest, Stockholm, Berlin, Prague, Amsterdam, Athens and Copenhagen.

Indicative that not only the working men but also the middle and upper classes concerned themselves with the case, Secretary Kellogg received cables of protest from such prominent people as President Mazaryk of Czechoslovakia, Madame Curie, Professor Albert Einstein, the Marquis de la Steyre, a grandson of Lafayette, Fridtjof Nansen, Alfred Dreyfus, Louis Loucheur, Joseph Caillaux, and many others. A part, even, of that large body of opinion in the United States which maintained that justice had been done in the matter and the forces of anarchy put to rout, insisted that the dilatoriness of Massachusetts courts remained a disgrace to the country and agreed with the statement of the *London Morning Post* that Massachusetts had turned the law into an instrument of torture. Perhaps this particular point of view was at the time best expressed by Charles H. Tuttle, United States Attorney for the Southern District of New York, who, while not mentioning this case by name, said at the annual convention of the Commercial Law League of America:

"When many years elapse between indictment and sentence and execution of that sentence in a notable murder case, the law itself is the thing really tried and condemned. Thereby a grave injustice is done to the defendants, whether guilty or innocent."

The prominence accorded the case in the press becomes strikingly evident from a review of the following headlines in the *New York Times*:

"World Stir Over Decision" (August 5th); "Sacco Reprisals Are Suspected by the Police" (August 6th); "Foreign Protests on Sacco Sentence"; "500,000 Called for Sacco Strike Here"; "London Embassy Boomed; Parade in Paris" (August 8th); "British Labor Makes Protest"; "Mobilize for March on Prison in Boston" (August 9th); "Father of Sacco Appeals to Duce"; "British Urge Mercy for Doomed Men" (August 10th); "Respite Leads all Shades of French Opinion to Agree against Execution"; "Rome Relies on our Justice" (August 12th); "Boston Police Stop Meeting" (August 15th); "Cities Set Guards on Sacco Decision" (August 20th); "Poem by Miss Millay" (August 22nd); "Europe on Edge; Expected Reprieve"; "Boston Besieged; Scores Arrested"; "City Crowds Silent on News of Death" (August 23rd); "Paris Mobs Loot Shops"; "London Radicals in Night Meeting" (August 24th); "Boston Still Torn Over Sacco Case" (August 28th).

For days long lines of liberals marched before the State House of Boston. The arrival of Vanzetti's sister from Italy intensified the feeling of thousands of people. Many not radical in their beliefs expressed the hope that the efforts of the prisoners' counsel to induce the Supreme Court of the United States to interfere and stay execution might be successful.

Excitement grew as the date for execution neared. The paraders before the State House became more numerous and many of them were arrested. The police of Boston took precautions as though against a riot or a siege. Nevertheless, and to the surprise of many people, the streets of the city re-

mained undisturbed by violence as Sacco and Vanzetti went to the chair.

Although it is not definitely known when Sacco and Vanzetti first met, the time must have antedated the war, for, in 1917, it was together they fled the draft. Both men belonged at the time to the Galleani group of philosophical anarchists, and both had been suspected by the United States Department of Justice of violation of the Selective Service Act and of holding views which made them liable to deportation. Sacco, in fact, several months before his arrest, had been told by Kelley, his employer, that Kelley knew him to be under investigation on account of his opinions.

If psychopathology should seriously concern itself with a study of the nations, national hysteria, its causes, manifestations and results, would come under closer scrutiny than heretofore and many of the phenomena of social history might be reinterpreted and evaluated in the light of fuller understanding. During Wilson's administration one of those waves of hysteria to which most nations have at some period of their development been subject was breaking over the country. The government, under the leadership of Attorney General A. Mitchel Palmer and using as its weapon the newly passed so-called Espionage Act, had been instigating criminal proceedings against thousands of suspected radicals in all parts of the country. Lurid statements were being given out frequently to the press, and headlines such as these from the *Boston Herald* had become common occurrences, "Bolshevik Plan for Conquest of America"; "Reds Pervade Empire State"; "Bride Thinks Reds Kidnapped Missing Groom"; "Boston Armed at all Points Against Reds." Under the caption "Shipping Lenin's Friends to Him" the *Literary Digest* of January 3rd, 1920, said of the old army transport *Buford*, sent off by the government on the previous Christmas, that its passengers included "conspirators of various types," "Bolsheviks, anarchists, I. W. W.'s, Communists and members of the Union of Russian Workers." "At the time of the sailing of the *Buford*," said the *Literary Digest*, "came assurance from the Department of Justice that more will follow."

During January Attorney General Palmer was quoted as stating about the extent of the Bolshevik infection in the United States: "The Red Movement is not a righteous or honest protest against alleged defects in our present political and economic organization of society. . . . It is a distinctly criminal and dishonest movement in the desire to obtain possession of other people's property by violence and robbery." "All their new words, 'Bolshevism,' 'Syndicalism,' 'Sabotage,' etc. are only new names for old theories of vice and criminality. In this country their adherents are to-day mainly grouped in three organizations, the Union of Russian Workers, the Communist Party, and the I. W. W. . . ."

"The Union of Russian Workers was organized with many local organizations throughout the country. Most of the agitators and leaders of this organization were taken in the first raid of the Department of Justice and have been deported. The 'mopping-up' will be continued. . . ."

"Each and every adherent of this movement is a potential murderer or a potential thief, and deserves no consideration."

In Congress Representative Johnson said: "The public is not seeing red without reason." And Secretary Wilson went on record to the effect that in his opinion membership in the Communist party was sufficient grounds for deportation.

In the New York Assembly the current emotion took astounding form. On the opening of the session of 1920 the Speaker of the House initiated the unseating of five members. Because they belonged to the Socialist party Orr, Claessens, De Witt, Solomon and Waldman, all duly elected members of the Assembly, were arraigned by Speaker Sweet, who accused them of "seeking seats in the Assembly after having been elected on a platform that is absolutely inimical to the best interests of the State of New York and the United States." It is amusing to recall that at this juncture George Bernard Shaw said: "It is high time for the Mayflower to fit out for sea again."

About fifteen hundred publications in thirty-three foreign languages and with a circulation of approximately eight million existed in this country at the time. Senator King proposed a bill to exclude these from second class mailing privileges, whereupon the Foreign Language Service of the government, formerly a branch of the Bureau of Public Information, sent out the following statement:

"We deplore the grave injustice which is being done to foreign-born peoples as a whole these days, by inaccurate and sensational newspaper stories; and the unfair and unfriendly treatment accorded them by Americans who are ignorant or misinformed concerning them and their press. Our eighteen months of intimate relations and work with the foreign language press have brought us indispensable proof that the large majority of these papers and peoples are American in the truest sense."

When Louis F. Post, Assistant Secretary of Labor, was criticized in the press and in Congress for too great indulgence towards radicals, he made a statement to the Committee in Washington to the effect that he was completely out of sympathy with philosophical anarchists as well as with all supporters of violent means for effecting changes in government. He defended himself by saying that he had followed the policy of confining his activities in deportation cases to finding out "whether the alien was guilty or not guilty." It is interesting to recall that in one of the cases in which he had canceled a warrant for deportation based on the alien's membership in the Communist Party he had said: "It is pitiful to consider the hardships to which they and their families (meaning the foreign-born) have been subjected by arbitrary arrest, long detention in default of bail beyond the means of hard-working wage-earners to give, for nothing more dangerous than affiliating with friends of their own race, country and language, and without the slightest indication of sinister motive or any unlawful act within their knowledge or intention."

In January, 1920, wholesale raids against alleged reds took place, accompanied in general by unlawful searches and seizures and other strong-arm methods on the part of government officers. Numerous arrests made under such circumstances in New England resulted in habeas corpus proceedings

on behalf of the accused persons which, in the spring of the year, came on to be heard before Judge Anderson of the United States District Court in Boston. During the course of his investigation the Judge denounced repeatedly both the methods the officials used in their attempts to secure evidence and the manner in which they carried out the actual arrests. On June 23rd he embodied the results of his investigation in a decision reported in 265 Federal Reporter, page 17, as Colyer against Skeffington.

Lawyers of distinction showed dissatisfaction with the official lawlessness of these raids and some of them expressed their disapproval. Mr. Moorfield Storey, in his introduction to Mr. Post's book, "The Deportations Delirium of Nineteen-Twenty,"¹ said:

"When, therefore, the Department of Justice alleged that there was a very large body of 'Reds' in the country, aliens with the principles of Russian Bolsheviks, who were organizing here to overthrow the government of the United States by force, and followed the statement up by raids all over the country in which men and women, aliens and citizens, were seized and imprisoned, we did not disturb ourselves about questions of constitutional law. The men responsible for these arrests, the detectives and those who employed them, filled the newspapers with lurid accounts of what the 'Reds' had done and were planning and produced on a small scale a 'reign of terror' in which some thousands of innocent people were very cruelly treated and exposed to much suffering and loss. The statements in the newspapers were false and misleading. There was no conspiracy to overthrow this government and no evidence was ever produced which excused the action of the government. The safeguards of the Constitution were ignored, and any true American must blush at what was done and at the indifference with which he and all but a handful of his countrymen tolerated it."

Charles Evans Hughes, later Secretary of State, member of the World Court, and now Chief Justice of the United States Supreme Court, wrote at the time:

"We cannot afford to ignore the indications that, perhaps to an extent unparalleled in our history, the essentials of liberty are being disregarded. Very recently information has been laid by responsible citizens at the bar of public opinion of violations of personal rights which savour of the worst practices of tyranny."

Professor Zechariah Chafee, Jr., of the Harvard Law School, in his book, "Freedom of Speech"² (pages 241-292; 320-364), dealt at length with numerous aspects of the arrests and deportations and the hysteria of that period.

During the latter part of 1919 and in 1920 a countrywide "crime wave" was being reported in the press of many of the large cities. Hold-ups, attempts to blow up churches, safe-crackings, thefts by motor bandits and lootings of suburban homes were noted with increasing frequency. Editorials suggested a variety of causes for the condition, among them these: that drug addicts were becoming more numerous, that organized seditious

¹ Chicago, Charles H. Kerr & Co., 1923.

² New York, Harcourt, Brace & Howe, 1920.

propaganda was being spread to inflame the radical minded, that the coal shortage had darkened the streets of the larger cities and so laid them open for miscreants, that prohibition had led to the use of a kind of liquor devastating in its effects, and, of course, that the aftermath of all wars includes an increase in crime. In February, 1921, when time to analyze this crime wave had elapsed, George W. Kirchwey, for ten years Dean of the Law School of Columbia University and at one time Warden of Sing Sing Prison, insisted that throughout the period the increase in the volume of crime had in actuality been slight. He described the nature of the crimes prevalent at the time as of the dare-devil, front-page sort, committed often by ex-soldiers who were both unemployed and accustomed to violence, and said he believed it was the nature of the crimes rather than any actual increase in their number which had gotten public opinion into a state of hysteria. While it continued the public sharply focused its attention on the police and on the administration of the criminal law. Leniency against offenders was decried in the press; vigilance on the part of the police, frequently commended. As the most visible and vulnerable arm of the government, the latter stood most of the brunt of popular blame for the reported continuation of the deplored conditions. New England, with its shoe towns and their mixed populations, proved no exception to the current experience. Daring hold-ups, accompanied sometimes by violence and murder, took place there. And the brutal and apparently needless murders at South Braintree, Massachusetts, committed in broad daylight and in full view of many persons, called forth to the utmost the energies of police authorities in the State.

The circumstances of the South Braintree murders were as follows: at about half past nine on the morning of April 15th, 1920, the agent for the American Railway Express in South Braintree took from an incoming train money destined for the Slater and Morrill shoe factory. He carried the consignment to his office in that one of the Slater and Morrill Company's two buildings which lies opposite the railway station. It was on his way there, he testified later, that he noticed two strangers in a touring car which he subsequently identified as that of the murderers. This car was later in the day seen by various people at different points in the town.

One of the men whom the agent, Neal, noticed in the car he described as blonde and emaciated. Some one answering this description was observed by Lola Andrews standing near the shoe factory with the person she later identified as Sacco. Directly before the shooting two strangers were seen leaning against a fence on Pearl Street.

The money which the express agent delivered was packed at the shoe factory into two metal boxes and turned over to Parmenter, Slater and Morrill's paymaster, and to Berardelli, the guard. Together they set out on foot to carry it the short distance from this building, opposite the railway station, to the other factory of the company, situated on Pearl Street.¹ As they neared the spot where the two strangers were leaning against the fence they were fired on. Berardelli dropped the money. Humped forward, he fell. One

¹ See plan facing p. 342.

of the assailants, identified later by the witness Pelser as Sacco, stood over him and shot four or five times straight into his body so that the man died instantly. Parmenter dropped his box and ran across the street. He was hit running.

As the shots rang out the Buick car appeared. The murderers, suddenly reënforced by a third man whom witnesses varyingly describe as jumping from the machine or rising all at once from behind a pile of bricks, sprang in with the two metal boxes. The car made off.

Shots rang from it, barring pursuit. With growing momentum it crossed the railroad tracks. Tacks, placed in pieces of rubber hose in order that they would remain upright in the road, were thrown from inside. Workers in the shoe factories, laborers on a near-by excavation and passers-by variously heard the shots, saw the shooting or watched the car speed away. Until well beyond the town, pursued for a time by the Chief of Police himself who, mis-directed, completely lost the trail, the vehicle rushed on, drawing the eyes of the curious and the startled.¹

From Boston to the Cape the countryside revolted at this, the newest daring murder and hold-up in the current wave of crime. The police garnered descriptions of the murderers from eyewitnesses. Reported clues and promises of early arrest filled the front pages of the newspapers. According to the *Boston Herald* the rumored physical characteristics of the bandits tallied with those of several men concerned in an earlier unsuccessful hold-up in Bridgewater.

The crime attempted in Bridgewater early on the morning of December 24th, 1919, was held generally to be the work of a number of Italians or other foreigners operating in a touring car. This automobile had been so placed that it blocked the passage of a truck containing a pay roll of the White Shoe Company. Two men in the street had tried to capture the truck. Their shots had been answered from the truck itself and they had fled back to their car and escaped. No one was hurt and nothing was stolen. Pinkerton detectives were put on the trail by the shoe company. They examined the various eyewitnesses and followed a number of clues but were unable to make any arrests. Michael Stewart, Chief of the Bridgewater Police, voiced the opinion that the criminals were Russian anarchists or radicals, of whom many had drifted into the shoe towns.

A few days after this attempted crime at Bridgewater, the police learned that shortly before the hold-up a Dr. Murphy in a near-by town had had his Buick touring car stolen from him. The public mind made the connection. It became accepted more or less as fact that the car at the hold-up and Dr. Murphy's Buick were the same. No further information seemed forthcoming after this, and for months the Bridgewater case dropped from the news.

Just two days after the murders at South Braintree Dr. Murphy's Buick was found abandoned near Bridgewater in the Manley woods. At once the *Boston Herald* called it "the murder car" and linked it with both crimes. The same paper advanced the theory that the killings were the work of amateurs

¹ See map facing p. 534

who had at once shot their men instead of merely robbing them. It was reported that the police were drawing in on the criminals, one of whom was said to be a draft dodger of Needham who had been involved in the vice traffic.

In actual fact the police remained for many days with no clues at all. The work of investigation was conducted by Captain Proctor of the State Constabulary and Chief Stewart of Bridgewater. Braintree's Chief of Police, Gallivan, after his unsuccessful pursuit of the car on April 15th, played only the slightest part in the ensuing events. The efforts of Proctor and Stewart were by now directed towards discovering a group of Italians with a machine.

Among resident Italians Mike Boda was known to have a car. Boda boarded near West Bridgewater in the shack of his friend, Coacci, who, on account of his radical affiliations, was at the time under deportation orders. A day or two after the Braintree shootings Coacci, apparently desiring to be put at once on a ship for Italy, surrendered. His wife moved out of the Bridgewater shack and so did Boda. But on April 20th, before Boda left for good, Chief Stewart interviewed him.

Just what this man's occupation was remains uncertain. Himself perhaps not a radical, he was the friend of radicals, at a time when to be such in one's associations and a foreigner besides, constituted strong grounds for suspicion. What was said at Boda's private meeting with Chief Stewart has never become known. And he was never arrested.

His car, a small Overland, had been out of condition for several months and on April 17th he had taken it to Johnson's garage in West Bridgewater. The police had arranged with Johnson that he notify them whenever it should be called for. Accordingly it was Mrs. Johnson's telephone call to the station which resulted in the arrest of Sacco and Vanzetti.

Nicola Sacco and Bartolomeo Vanzetti had come from Italy at about the same time. Sacco, son of a substantial dealer in olive oil, was born in Torremaggiore in 1891. He grew up fond of the out-of-doors and of physical labor, and close to his Catholic parents and his elder brother. His first work was in the vineyards but later he learned to be a mechanic. When, on the suggestion of a friend of the family who lived in Milford, Massachusetts, his older brother emigrated, Nicola Sacco went with him to the United States. In Milford he found a job on some sanitary construction with the Draper Co., and from there, six months later, went into a foundry in Hopedale. Learning edge-trimming he next took a position with the Milford Shoe Company and here he remained seven years. In 1912 he married, and the following year his son, Dante, was born. Mrs. Sacco was a good-looking woman who, with her husband, sometimes gave amateur plays to raise money for the relief of strikers. Sacco had become interested in socialism soon after his arrival in this country and through the influence of a man named Galleani, who lived in Massachusetts, he later developed into a philosophical anarchist. He lived regularly, worked in his garden and was devoted to his family.

Sacco was still employed by the Milford Shoe Company when, in 1917,

the Draft Law was passed. To evade it he fled into Mexico. And when, a few months later, he came back so as to be with his wife and child, he called himself by an assumed name. Under that name he worked at making candy in Cambridge and, for a few days during October, 1917, at the Rice and Hutchins shoe factory in South Braintree. After the armistice he resumed his identity and took a job under Michael F. Kelley at the 3K Shoe Factory in Stoughton. Except for an absence due to sickness before Christmas of 1919, he worked continuously for Kelley, who had been superintendent at the Milford factory and had there known him, from 1918 until the time of his arrest in May, 1920. He was employed as an edger, and at one time also as night watchman of the factory. He was looked on as a very steady man. And he had saved money which he had deposited in his wife's name in a saving's bank.

Vanzetti came from the foothills of the Piedmont. Born there in 1888, the son of a comfortable, middle-class farmer, he left school at thirteen to learn pastry-cooking and candy-making, a trade at which he worked for three years in the city of Turin. After a few periods of unemployment he was taken ill and went home to his mother and father. On his mother's death he sailed for New York. He had developed at this date the habit of reading and studying and was already interested in radical social ideas.

In New York he got employment in a club and as kitchen helper in Mouquin's restaurant. After finding himself out of a job he left with a friend for Connecticut where he worked in several towns in brickyards and quarries. Later he went back to his trade as pastry-cook and was successively employed in various restaurants of New York. His next removal was to Massachusetts. In Springfield he worked on the railroad, in Worcester in an iron-mill. Of Springfield he said later that there "the Italian work and live like a beast." Finally, in 1913, he arrived in Plymouth and here he remained continuously until his arrest, with the exception of that time during which he, like Sacco, was fugitive from the draft. The variety of the jobs Vanzetti held is astonishing; and after 1916 he had apparently no consistent employment at all. During the years in Plymouth he worked as gardener, employee of the Plymouth Cordage Co., laborer on a breakwater, bricklayer's assistant, general contractor's helper, and ice-cutter. At the plant of the Plymouth Cordage Company he was active in a strike in 1916 and, looked on from that time as an agitator, he was not reemployed afterwards. When out of a job he peddled fish and dug clams. All through the war he stayed away from Plymouth and divided his time between Mexico, Pennsylvania and the city of St. Louis, Mo.

During the spring of 1920 friends of Sacco and Vanzetti, among them Fruzetti and Coacci, were deported. In New York Elia and Salsedo had been taken into custody by agents of the Department of Justice and kept for weeks in one room of a building in Park Row. The group of Italian radicals to which Sacco and Vanzetti belonged was concerned about this confinement, contributed money to assist the two men and, late in April, 1920, sent Vanzetti to New York to find out what Salsedo's situation really was.

Vanzetti made the trip and conferred with the prisoners' friends. He was told, among other things, that a new series of governmental raids should be expected around May 1st, and was advised to hide away all radical literature with the whereabouts of which he might be familiar.

On his return to Boston, therefore, he began arrangements to get the use of an automobile, intending by means of it to gather together all the radical literature he knew to be in the possession of his friends and acquaintances.

In New York, on the morning of May 3rd, Salsedo was found dead on the pavement outside the building in Park Row. Whether the man committed suicide or whether he was forced to his death has never since been established. In regard to the event the *Boston Herald* of May 4th carried an article headed "Suicide Bares Bomb Arrests," in which it hinted that it was for their own protection Salsedo and Elia had been held by the Federal authorities, since both men had been helping the government round up other members of that "Galleani group of bombers" which had "staged the death conspiracy" of June, 1919. Sacco and Vanzetti, as they later claimed, were alarmed and disturbed upon learning of Salsedo's death. Just about the time it became known Sacco arranged definitely for the use of the automobile which belonged to Mike Boda. On the evening of May 5th Boda, Sacco, Vanzetti and a friend of all three, Orciani, started from Sacco's house for West Bridgewater to get the car. Sacco and Vanzetti went by trolley, Orciani and Boda used the former's motor cycle. On the way Vanzetti drafted a notice for a meeting planned to take place on the following Sunday in Brockton, and gave the draft to Sacco, who was to have it printed. On arrest it was found in Sacco's possession. It read as follows:

"Fellow Workers, you have fought all the wars. You have worked for all the capitalists. You have wandered over all the countries. Have you harvested the fruits of your labors, the price of your victories? Does the past comfort you? Does the present smile on you? Does the future promise you anything? Have you found a piece of land where you can live like a human being and die like a human being? On these questions, on this argument, and on this theme the struggle for existence, Bartolomeo Vanzetti will speak. Hour—day—hall. Admission free. Freedom of discussion to all. Take the ladies with you." [2120]

When Boda and Orciani reached the Johnson garage they found it closed and went to the owner's home near by. Sacco and Vanzetti followed them there and all four waited for Johnson. Mrs. Johnson answered the doorbell, found out what the men wanted, and then went over to a neighbor's house. Here, according to the arrangement made with the police to the effect that she notify them if Boda's car were called for, she telephoned the station. Boda was at the moment being advised by Johnson to leave his car where it was, because it had no license-plates for 1920. It seems the man accepted this advice because, while Mrs. Johnson was on her way back, he drove off on the motor cycle with Orciani.

Boda was never again seen in the United States.

Sacco and Vanzetti walked away from the garage and soon thereafter

boarded a trolley car for Brockton. The police entered the car while it was passing through the Campello section of the town, arrested the two men and drove them in an automobile to the police station. Here Chief Stewart of Bridgewater at once examined them as to their political beliefs but asked them nothing which related in any way to the crime at Braintree or the earlier attempted hold-up at Bridgewater. On the following day District Attorney Katzmann questioned them. Like Chief Stewart he asked Vanzetti nothing which related to the Bridgewater crime or that at South Braintree, except that he wanted to know what Vanzetti had been doing on the Thursday before Patriots' Day, April 19th. He did ask Sacco whether he had read in the newspapers about the Braintree crime and what he had done on the day before he saw it reported in the press. Neither Sacco nor Vanzetti was at the time charged with participation in either hold-up. Both men were first held on charges, to which they pleaded guilty, of unlawfully carrying firearms. Sacco when arrested had a .32 Colt pistol and thirty-two cartridges of various makes; Vanzetti, a .38 Harrington & Richardson revolver with no extra cartridges, but he had a number of shotgun shells in his possession. At the time of the trial Vanzetti said he had purchased his gun a few months earlier as a protection against hold-ups. Sacco had owned his pistol for several years. His employer knew that he had one and had at one time suggested his getting a permit which, however, Sacco had failed to do. It was claimed by one of the officers that defendants made efforts to use their guns when arrested.

Early in 1920 Sacco had received the news of his mother's death, and arranged to go to Italy on a visit to his father. A few days before he was taken into custody by the police he had secured a passport; and when the arrest was made on May 5th he was expecting to sail for Italy on the Saturday thereafter with his son and his wife, then carrying the little girl who was to be born before the trial.

Immediately upon their apprehension pictures of Sacco and Vanzetti appeared in the press with a lengthy account of the circumstances of their arrest, a statement of their suspected connection with the Braintree crimes and further hints to the effect that the police believed them guilty of the Bridgewater hold-up as well, and of plans for a third crime and a subsequent escape to Italy. On May 8th the *Herald* announced that the police had clues to more of the bandit gang.

Orciani, taken into custody at the factory in which he worked, on the day following the arrest of the other two men, was dismissed because he proved at once that he had been working on April 15th.

Eyewitnesses of the Braintree murders were brought to look Sacco and Vanzetti over. Some could make no identification, some picked Sacco as one of the bandits who had done the shooting there, some identified him as having been near the spot before the crime and in the murderers' car after it. Originally no one claimed to have observed Vanzetti at the scene. Some time later he was identified as having been in the car after the shooting and was from then on accused of having had a hand in both crimes.

At the time of his arrest Vanzetti could not recall definitely where he had been on April 15th, the day of the Braintree murders. When, subsequently, he was accused of having participated in both the Braintree and the Bridgewater affairs, he claimed that on December 24th, the date of the Bridgewater crime, he had been busy peddling eels in response to a customary demand of Italians on Christmas Eve and that on April 15th he had been hawking fish in Plymouth.

It was established that Sacco had been at work on December 24th, 1919, and he was therefore never accused of complicity in the hold-up at Bridgewater. When first questioned regarding his whereabouts on April 15th, 1920, he expressed the belief that on that day, too, he had been working in the factory. Later he claimed that this was not the case, but that April 15th was the date on which he had gone to the Italian Consul's office in Boston to get his passport. He said that an official in the consul's office had on that day talked with him, telling him he would have to come again because the pictures he had presented for the passport were too large.

As soon as their friends discovered that the two men were charged with serious crimes they took steps on their behalf. Mr. John P. Vahey, of Plymouth, was retained to take charge of Vanzetti's interests. He cross-examined the witnesses who appeared on May 18th at the preliminary hearing of the Bridgewater case. At the conclusion of this hearing Vanzetti was held without bail for the Grand Jury on the statement of the Assistant District Attorney that he had witnesses identifying him in connection with the South Braintree affair.

On June 11th indictments were found against Vanzetti charging assault with intent to rob and with intent to kill, in connection with the Bridgewater hold-up. His trial on these indictments before Judge Webster Thayer and a jury took place at Plymouth, beginning on June 22nd and ending on July 1st.¹ The defendant was not put on the stand in his own behalf. Found guilty and sentenced to a term of from twelve to fifteen years, he approached the murder charges with a conviction against him.

The District Attorney, Frederick Katzmann, has been criticized for trying Vanzetti on the lesser charge before trying him on the murder charges. Mr. Katzmann, it has been argued, should not have complicated the chances of two defendants in a capital case by seeking first to procure a conviction of one of them for attempted robbery. Later defendants' counsel went so far as to imply that Mr. Katzmann had deliberately arranged the order of the trials in the hope that a conviction for the Bridgewater hold-up would materially lessen Vanzetti's chances in the Braintree case, and would likewise injure Sacco's hope of acquittal on account of his association with a convicted criminal.

Mr. Katzmann denied this intention before the Lowell Committee in 1927. He declared that the order of the trials was accidental and due to the impossibility of securing indictments in Norfolk County before September, whereas in Plymouth County the Grand Jury had been in session at the

¹ This trial is discussed in the Appendix to Part I, pp. 183 to 201.

time under discussion. He added that in the Braintree case the defense had wanted so many adjournments that it had become inevitable he try the other case first. No necessary connection really existed, however, between the order of the trials and the order of the indictments; besides this, an extra session of the Norfolk Grand Jury could have been asked for; and it was, as a matter of fact, at the time suggested by the press as likely to take place.

At the preliminary hearing on the Braintree murders Sacco's lawyers were Mr. Callahan, who later assisted at the trial, and two other men, who never again figured in the case. Counsel for the defendants used the minutes of this hearing at the trial, but they have not been published. The indictments, not found for four months, until September 11th, included both Sacco and Vanzetti in the charges of murder.

Friends of the prisoners had meanwhile been organizing a Defense Committee of which Aldino Felicani, associated with the Italian paper, *La Notizia*, became the moving spirit. Among those who assisted him were Arthur Giovanitti, one of the co-defendants in the famous Lawrence murder case which arose out of a strike; Elizabeth Gurley Flynn, who had been active in helping the silk workers of Paterson, N. J.; Mrs. Elizabeth Gledower Evans, who loaned money at difficult moments; and others, who, at one time or another during the seven years of defense, gave of their time, energy and money. The Committee raised funds for the defense of both cases to the amount of more than fifty thousand dollars. And after the convictions it collected about two hundred and seventy-five thousand dollars more in the hope that new trials might be granted. It was this Committee which retained Mr. Frederick Moore as chief counsel for Sacco. Moore was a western radical lawyer known in the East through having been counsel for Ettor and Giovanitti in the Lawrence murder case. The two brothers McAnarney, well-known practitioners in Norfolk County, were retained for Vanzetti.

Several newspapers interpreted an explosion in Wall Street outside the building of J. P. Morgan & Co., in September, 1920, as evidence of reprisals by the Galleani "gang" for the prosecution of Sacco and Vanzetti. With this theory in mind agents of the United States Department of Justice at about this time placed a spy in the cell next to Sacco's in the hope that he might learn something on the subject from the prisoner. The spy reported failure.

During the winter of 1920-21 a Mrs. DeFalco approached Mr. Moore with the story that the acquittal of Sacco, and perhaps even of both defendants, might be procured from the authorities by the payment of a large sum of money. After a number of interviews with her Mr. Moore preferred charges of soliciting a bribe against this woman in a Boston police court. The charges were dismissed by Judge Murray after a hearing.

Just before the trial for the South Braintree murders took place articles appeared in the press commenting on the unusual interest aroused, especially in radical circles, by this case. One reporter compared it in importance with the Mooney case. Some touched on the interest Sacco and Vanzetti had

shown in the fate of Salsedo and one paper attributed the attention focused upon the affair to a claim that the defendants were being persecuted to cover the mistakes the United States Secret Service had made in the Salsedo matter. It was also remarked that the defendants had upon arrest been subjected to heavy grilling regarding their radical beliefs. There was no reference in any of these articles to Vanzetti's conviction for the Bridgewater crime; but on the day the trial opened many newspapers mentioned that Vanzetti had been brought to court from prison where he was serving time for another offense.

This thought, that the radical views of the defendants might enter prejudicially into the case, was expressed by the Italian Consul, the Marquis Ferrante, instructed by his government to attend the trial and express openly his hope that the defendants' views would not be allowed to affect proceedings.

The trial took place at Dedham, a residential suburb of Boston and continued from May 31st to July 14th, during a spell of unusually hot weather.¹ Judge Webster Thayer presided also at this trial. The leading news associations, as well as the Boston papers, had special reporters cover the case. The Greater Boston Federation of Churches sent a representative who later made an exhaustive report in which she expressed the opinion that the evidence at the trial had been insufficient to justify the convictions.

Such elaborate precautionary measures against danger were taken by the court authorities that on the opening day of the trial some one likened the progress of the defendants between the courthouse and the jail to a miniature police parade. In the second week of proceedings the practice was adopted of examining for concealed weapons all strangers who entered the court room; and whether or not the guards around and inside the courthouse were armed, became the subject of later discussion. There seems no doubt, however, that their numbers and their activity alike were unusual. The Judge himself took great pains on several occasions during the trial to make certain that even those firearms which were necessarily being handled as exhibits were not loaded.

When the verdict, guilty, was rendered the defendants seemed stunned at first. In the next moment Sacco, holding up two fingers, cried aloud. His cry came first in Italian: "*siamo innocente*," then in English. Some of the jurors, according to the press, looked back as they were leaving the court room but no one stopped. Mrs. Sacco rushed to her husband and screamed: "Oh they kill my man, what am I going to do, my two children." Her cries grew more and more hysterical and she had to be taken away. Tears filled the eyes of some of the police officers who had had the defendants in charge during the trial.

Sacco and Vanzetti were led back to jail to await further legal proceedings, Sacco remaining in Dedham, Vanzetti being removed to Charlestown under his sentence for the Bridgewater hold-up. Since by Massachusetts law it is not customary to pronounce sentence in capital cases until all legal

¹ A detailed account of the trial is given in Chapter II, pp. 26 to 102.

steps have been exhausted, sentence was not pronounced on the convicted men until April 9th, 1927.

After the trial supporters of the defense claimed that in a number of remarks Judge Thayer had fanned the patriotic prejudices of the wholly native jury and that he had permitted a cross-examination of Sacco which brought into unnecessarily devastating fullness the defendant's radical political views. On the other hand many people praised the fairness of the Judge's charge. These attributed the verdict of guilty to a combination of two factors: the positive evidence against the accused and the effect on the jury of the lies Sacco and Vanzetti told the police when first they were examined.

In the meantime propaganda against the verdicts spread through foreign radical and socialist groups. It was based in part on the mistaken suspicion that in his charge Judge Thayer had discriminated against the defendants because they were Italians; but in the main the criticism of the verdicts rested on the belief that it was the radical and pacifist views of the condemned men which had been responsible for their conviction. Meetings of protest took place during the month of October, 1921, in Milan, Brest, Rio de Janeiro, Holland, Sweden and Switzerland. In Montevideo a strike was called. A bomb thrown in Paris injured the valet of the American ambassador and troops were called out in that city to prevent a demonstration. Italian newspapers demanded a revision of the trial. Anatole France, Romain Rolland and Henri Barbusse joined in a cable to President Harding in which they asked his intervention.

As a result of all this agitation the Massachusetts police felt it necessary to protect the home of Judge Thayer; and on the day set for hearing a motion for a new trial based on the minutes of the case, they guarded the courthouse. Before that day came there had been bomb explosions in Havana and Lisbon and protests in Lima and the Argentine Republic. After the argument, protests continued to arrive from the Swiss Workmen's Union, from Mexican radicals, from workers in New York. On December 24th, 1921, Judge Thayer handed down his decision denying the motion.

As indicative of public sentiment at the time two editorials in the *New York Times* are of interest. On October 24th, 1921, under the heading "Sacred Reds," the eminent Frenchmen who, in their ignorance of the American Federal system, had communicated with the President, were chided for their support of two justly convicted criminals. Discussing the agitation in favor of the convicted men the editor said:

"The Judge's charge was eminently impartial. The indignation manufactured and manifested against it in Europe seems to arise in part from a forged quotation, but is suspected to have been fomented originally by two Communist comrades of the defendants. One comrade, himself suspected of complicity in the murders, managed to escape to Europe. The other was deported by the Government. . . . A fat fund is being raised by the domestic Reds, responding to the fury of their brethren on the Continent. Every legal technicality will be used."

In an editorial on December 26th, 1921, entitled "Due Process of Law," in

which it pointed out that all the legal rights of the defendants would be scrupulously considered by Judge Thayer and that thus "the dignity of the courts will have been upheld and the administration of justice vindicated," the same paper praised the decision denying the motion for a new trial. This article noted further that in the United States there had been no "extensive and inflammatory agitation" due to the verdicts.

The defense made great effort during the next few years to break down the positive evidence against Sacco and Vanzetti. They filed a series of motions for new trials, based either on alleged retractions by witnesses for the prosecution or on new evidence relating to the guilt of the prisoners.¹ All these motions were, in accordance with regular practice, heard by Judge Thayer. He denied them all at one time in a number of decisions, of which some drew down on him further criticism for alleged intemperance in speech and errors of fact.

Several years had elapsed. Sacco, because he was not yet under sentence, was not allowed to take part in the regular activities of the prison. Early in 1923 he became despondent and attempted a hunger strike, with the result that he was declared insane and was so considered for a time. Vanzetti, under sentence for the Bridgewater hold-up, had regular occupations to keep him active. He studied, besides, to improve his knowledge of English and kept up a profuse correspondence with his friends and supporters. His letters, with Sacco's, were published in 1928 by the Viking Press. Vanzetti took great interest in the progress of the case and kept in touch with developments. He too, however, succumbed, early in 1925, to a deep depression and was removed for a short period to the Hospital for the Insane. At this time he maintained that the Fascisti were trying to get him out of the way and that some member of that organization might be a prisoner and do him harm; wherefore he requested permission to carry a gun. He made disturbances in his room, abused another prisoner for no apparent cause and reduced a chair to kindling wood. State alienists reported to the Court their belief in his insanity and the view was confirmed by Dr. Abraham Myerson, an expert employed on his behalf. The prisoner himself invariably expressed the opinion that he was sane; and he insisted that he need not be removed from prison.

Much of the work for the defense in these later years was conducted by a prominent and conservative lawyer, William G. Thompson, member of the council of the Boston Bar Association. He argued some of the motions for a new trial and prepared the brief on the appeal from the judgment of conviction and from the denial of these motions. From the time he entered the case the prisoners and their supporters felt somewhat as though they had turned a corner and were looking on an altered and perhaps a fairer prospect.

A good deal was hoped for from the appeal which Mr. Thompson argued before the Supreme Judicial Court of Massachusetts in January, 1926. That court, however, decided that no errors had been committed by Judge Thayer at the trial or in his denial of the various subsequent motions.²

¹ The motions are discussed in Chapter III, pp. 103 to 118.

² The appeal is discussed in Chapter III, pp. 119 to 125.

All this time, although most witnesses of the murders at South Braintree had seen five men participate in the crime, the police had made no effort to find the other three bandits concerned. The charge against Orciani had been dismissed at the very beginning; Boda bore no physical resemblance to any of the men described; and Coacci's trunk, suspected by some of containing the vanished loot, had been intercepted and found to hold nothing suspicious. Nor did the defense suggest any who might be guilty.

In November of 1925, however, while the appeal was pending undetermined, Sacco made the acquaintance in jail of a young Portuguese, Celestino Medeiros,¹ there under sentence of death. Medeiros claimed he had been present at the Braintree shooting in the company of a gang of Italians he described but refused to identify. His statement entirely exculpated Sacco and Vanzetti; and from other sources the identity of the men he portrayed was established as that of the brothers Morelli and their associates, well-known criminals of Providence, R. I.

The supporters of Sacco and Vanzetti believed that evidence pointing to the Morellis as the murderers should constitute grounds for a new trial. But Judge Thayer took the stand that Medeiros, a criminal and unworthy of being taken seriously, was trying by the manufacture of this confession to prolong his own life.² The defense called the Judge's opinion an irrational document, self-justificatory and evasive of the issues. At this juncture the *Boston Herald*, until now, like the rest of the press, hostile to the defendants, expressed grave doubt of their guilt and in an editorial later awarded the Pulitzer prize for the most outstanding piece of journalism during 1926, recommended an impartial review of the entire case. The *Springfield Republican* joined in this point of view and many men prominent in Massachusetts expressed the same opinion.

The persistent hostility of general public opinion in Massachusetts may be attributed to a number of elements then existing. To begin with, a large proportion of the population in this state is Catholic. The defendants, extreme radicals by belief, were renegades to their faith. Catholics both by birth and upbringing, they had turned away from the church. They had their own spiritual values, their own morality. These views of the defendants alienated not only the Catholic element but also the entire conservative middle-class community. That they were foreigners may have affected the attitude of the native New Englander who tended to look down upon the growing numbers of Italians and Portuguese in the communities between Boston and the Cape and who probably feared them. Finally, local patriotism, aroused by criticism of the courts of Massachusetts, long a source of pride to that community, rushed to the defense of these courts without too careful a scrutiny of the particular case which had called forth the criticism. As in France at the time of the Dreyfus affair, outside interference was bitterly resented, and the agitation in other states and other countries was in the main ignored, as fomented by radicals.

¹ The name is given as "Madeiros" in many parts of the record.

² See Part II, Chapter VII, pp. 510 to 534.

The feeling about the case was further complicated by the inclusion in the Medeiros motion of charges by the defendants' attorneys involving the United States Department of Justice.

Several people made affidavits, read at the hearing to Judge Thayer, to the effect that an arrangement had existed between the District Attorney and the Boston office of the Department of Justice, whereby Mr. Katzmann was to have emphasized the anarchism of the defendants with a view to confirming them as material for deportation, and the Boston office was to have reciprocated by helping the District Attorney secure a conviction.¹ Correspondence in proof of this coöperative arrangement was sworn to exist in the files of the Department of Justice in Boston. Mr. Katzmann never denied that there had been some coöperation.

When Mr. Thompson tried to get access to the files from United States Attorney General Sargent, in Washington, he was not permitted to do so. At the eleventh hour, just prior to execution, a last attempt was made by counsel to have the records opened. This time the Attorney General stated that he had had the files gone over and that no material bearing on the guilt of Sacco or Vanzetti was in them. He now expressed himself as ready to open these records upon order from the Governor. Governor Fuller gave no order. The files were never opened.

A synopsis of the contents of the files was unofficially given in the *Boston Traveler* of August 22nd, 1927. This account stated that neither Sacco nor Vanzetti was under suspicion by the Department of Justice before arrest, although they had been known as subscribers to the Galleani paper; that the Department of Justice had not known of Vanzetti's visit to New York to see Salsedo; that Carbone, the spy, had been placed next to Sacco's cell in the hope of learning something about the Wall Street explosion. It was finally reported that before the trial the local prosecutor had inquired whether radicals in New York had received any large sums of money after the murders and that the New York office of the Department of Justice had made an investigation which failed to disclose the existence of any such influx of funds.

Public interest took on increased proportions during the interval between the argument of the appeal from Judge Thayer's denial of the Medeiros motion and the decision of that appeal by the Supreme Judicial Court. The United Mine Workers of America urged a new trial. In Paris posters demanding justice were placed all over by the Socialists and it was felt necessary to send guards to the United States Embassy. In the *Atlantic Monthly* for March, 1927, Professor Felix Frankfurter of the Harvard Law School wrote a review of the case in which he expressed the belief that defendants were entitled to a new trial. A book from his hand containing the same material in expanded form appeared shortly thereafter and a controversy developed about the case between Professor Frankfurter and Professor John Henry Wigmore, eminent authority on the law of Evidence and then Dean of the Law School of Northwestern University.

The appeal taken from the Judge's decision in the Medeiros motion was

¹ See Chapter III, pp. 126 to 133 for a discussion of this issue.

unsuccessful.¹ As no further legal steps remained to be taken sentence was now imposed. In addition to remarks made in Court by both prisoners, (quoted in full hereafter²), Vanzetti made a public statement in which he said:

"If it had not been for these thing, I might have live out my life talking at street corners to scorning men. I might have die, unmarked, unknown, a failure. Now we are not a failure. This is our career and our triumph. Never in our full life could we hope to do such work for tolerance, for joostice, for man's onderstanding of man as now we do by accident. Our words—our lives—lives of a good shoemaker and a poor fish-peddler—all! That last moment belongs to us—that agony is our triumph."

The defendants thereupon petitioned Governor Fuller for clemency, advancing as one of the grounds therefor the prejudice of Judge Thayer, which, they claimed, had been manifested partly in the legal proceedings and partly in various remarks made outside the court.³ Counsel announced that the Governor would be asked to appoint an impartial commission to review the cases.

At first Governor Fuller refused to appoint a commission; and he instituted instead a secret inquiry of his own. He denied the request of the defense that there be public hearings at this inquiry and also refused to permit counsel to be present during his interviews of witnesses. No record was kept of his proceedings nor were counsel ever informed as to what had been told him nor even as to whom he had seen, although they were permitted to suggest names of persons they desired him to interview and were also allowed to argue before him and his personal counsel, Mr. Joseph Wiggin.

In many quarters there now arose the insistent demand that the Governor submit this case for complete review to an impartial tribunal; at one time rumor had it that Mr. Charles Evans Hughes would be asked to preside over such a body. For a time, however, the Governor insisted that, as the responsibility for a decision rested with him, he could not divide it. Nevertheless, on June 1st, 1927, he announced the appointment of an advisory committee to report to him on the fairness of the trial and on the weight of evidence against the convicted men. Abbott Lawrence Lowell, President of Harvard University, a lawyer by education, but a teacher and administrator by experience, member of a distinguished Boston family, became its chairman. The other members were Samuel W. Stratton, President of Massachusetts Institute of Technology, a man without legal experience or training, and Robert Grant, a writer of fiction, formerly Judge of the Massachusetts Probate Court, that court which has to do with estates and guardianships. Counsel for the defense protested Judge Grant's appointment at once, on the ground that he had expressed views hostile to Sacco and Vanzetti. After interviewing Judge Grant the Governor refused to alter his choice.

The appointment of the Committee resulted in a general feeling that the case would now be lifted out of the atmosphere of propaganda into which the adherents of the defense had carried it. Some misgivings were expressed,

¹ See Chapter III, pp. 133 to 136 and Part II, Chapter VII, pp. 516 to 534.

² Chapter IV, pp. 137 to 145.

³ See Chapter IV, pp. 145 to 148.

however, when it came to be known that the Committee had refused the request of defendants' counsel for public hearings. The reason stated for this refusal was, that since the Committee could not compel the attendance of witnesses, the publicity might interfere with the ascertainment of the truth. Supporters of the defense asserted that this reason would not apply to any of their witnesses and also that people would be more likely to tell the truth if their statements were published.

While the Lowell Committee debated and Governor Fuller awaited their report he went on with his own inquiry.¹ Suspense, acute while the hearings were in progress, reached a peak when the announcement came that a decision would be made public on August 3rd. Under the law the consent of the Governor's Council was necessary to a pardon or a commutation of sentence. When, therefore, a meeting of this council was called for August 3rd the announcement was interpreted by some people as a hopeful omen. On the other hand, reports from adherents of the defense who had been interviewed by the Governor seemed pessimistic. The defendants themselves, especially Sacco, had little hope. So well-informed a paper as the *New York Times*, however, carried on the morning of August 3rd a lengthy account of the steps it was expected the Governor would take to make possible a new trial. The article said he expected to call the Legislature in session to pass legislation to that end, and that it was a last minute interview with Judge Thayer which had apparently turned the tide. However, on the third it was announced that the meeting of the council had been adjourned for a day, which was interpreted by some of the afternoon papers as a sign of ill omen for the defendants.

In the meantime meetings of protest were taking place all over the world. The defendants, waiting together in Charlestown jail, had gone on a hunger strike in demonstration against the reported attitude of the Governor. On August 1st Vanzetti decided he would break his fast but Sacco, then already sixteen days without food, continued to abstain until August 15th when he succumbed to forcible feeding.

Late in the night of August 3rd Governor Fuller announced his own decision finding the trial fair and expressing his belief that the defendants were guilty.² He stated that his Advisory Committee was unanimous in reaching the same conclusion. The execution of both defendants as well as that of Medeiros, whose life had been prolonged pending the investigation, was thereupon set for just after midnight in the night of August 10th to 11th.

Excitement over the decision spread rapidly. In the press and in messages sent to him directly Governor Fuller found himself praised for courage by some, sharply and bitterly criticized by others. Much dissatisfaction was expressed with regard to the tone of his report, particularly respecting its emphasis on the emotional aspects of the case and the brutality of the crime. A more reasoned explanation of the affair seemed to many people to be due the world. On Sunday, the 7th, the report of the Lowell Committee was released for publication.³ It seemed to be that reasoned consideration of all the

¹ The hearings are discussed in Chapter IV, pp. 151 to 161.

² Quoted in full, Chapter IV, pp. 161 to 165.

³ Quoted in full, Chapter IV, pp. 165 to 177.

issues for which the critics of the Governor had asked. Further study of it, however, led liberal journals such as the *New York World*, the *Baltimore Sun*, the *New Republic*, and the *Nation* to manifest their dissatisfaction. In Massachusetts the *Springfield Republican* alone voiced protest.

From all over Europe, however, and from the rest of the United States, came many statements of criticism to the effect that Sacco and Vanzetti had been persecuted partly for their convictions, and partly because they were foreigners in the United States during a period of anti-foreign hysteria. The *St. Louis Post-Dispatch* asserted that only a flimsy thread of evidence had been established between the prisoners and the crime "which they in all human probability did not commit." The *New York Evening World* was not satisfied that the bullet which killed Berardelli had been identified beyond reasonable doubt as having come from Sacco's pistol. It stressed Sacco's previous record and said that Vanzetti's also showed perhaps no association with a crime such as the one for which both men had been convicted. The *New York Telegram* said that a secret hearing such as had been had by the Lowell Committee, and a decision on evidence so heard, was far from constituting the new and open trial the public had demanded. This paper joined a number of others such as the *New York World*, the *Norfolk Virginian-Pilot* and the *Springfield Republican*, in expressing dissatisfaction with the Committee's treatment of the charge of prejudice against Judge Thayer; one of the newspapers wondered what the members of the Committee would consider prejudicial conduct on the part of a judge. The *World* devoted an entire editorial page to criticism of the reasoning and conclusions of the Committee's report. In a long letter to the *New York Times* Mr. Charles C. Burlingham, later President of the Association of the Bar of the City of New York, expressed similar views. Many of these papers insisted, as did also journals in other cities, that a civilized application of the principles of justice required commutation of the death sentence to life imprisonment.

A tremendous number of newspapers, on the other hand, took the view that all had been done that could be done and that the conclusions of the Committee and Governor Fuller would be acceptable to the conscience of America. "Human law can do no more," said the *New York Times*. "No men, convicted by due process of law, ever had greater consideration," the *Philadelphia Inquirer* stated. All over the country editors seemed to believe that the distinction and the accepted impartiality of the triumvirate who composed the Committee gave to the verdict a quality of dignified finality. And the belief that any decision other than the one arrived at would have been merely a cowardly weakening before anarchy and crime found thousands of advocates. "This case," said the *Boston Transcript*, "has been the vehicle of as vicious propaganda as ever deluged a community. Radicals the world over saw here an opportunity to further what they call their cause. And the strange circumstance is that many well-meaning citizens either thought these foreign agitators were in earnest or were afraid of what they might do. The advice that they then gave was, on the one hand, the counsel of misguided sympathy; on the other, the counsel of fear."

Mr. Thompson had retired from the case before the Committee's decision was made public, because he believed he had given all he could and new minds might better handle the steps still open to the defense. Mr. Arthur D. Hill, former District Attorney of Suffolk County, in which Boston is situate, took over the further care of the interests of the condemned men. On August 6th, he made a motion for revocation of sentence and for a new trial on the ground of Judge Thayer's prejudice. Both motions were denied by Judge Thayer himself on the ground that the motions, being made after sentence, had come too late. On August 10th, just before the hour set for the execution, Governor Fuller granted a reprieve until the 22nd in order that there might be time for an appeal. On appeal to the highest court of the state Judge Thayer's decision was upheld.

While these proceedings were pending counsel for the defense made application to a number of Federal judges, including Justice Holmes of the Supreme Court, for a writ of habeas corpus.

Under the American Federal system the courts of the United States can review criminal convictions in state courts only where a question is raised under the United States Constitution, and then only when the point has been properly made in the state court. In this case no claim was made at the trial that any right of defendants under the Federal Constitution had been infringed. It was, however, argued by their attorneys, as the basis for the pending proceedings, that Judge Thayer's prejudice rendered the trial void and deprived the defendants of due process of law. The various applications for habeas corpus were denied on the ground that prejudice charged against the judge did not render the proceedings in the state court void. The United States Supreme Court has shown great reluctance in interfering with state courts where, as here, the question raised has been one of due process. In 1914, for instance, it refused to interfere with the conviction of Leo M. Frank for murder in Georgia, on allegations that disorder in and about the court room amounted to mob domination and thereby deprived the prisoner of due process of law to which, under the Fourteenth Amendment to the Constitution, he was entitled. On the other hand, in 1922, in a case involving five negroes in Arkansas, the Court held that the papers showed such mob activities as in effect to deprive the state court of jurisdiction, and it instructed the lower Federal Judge to make an inquiry into the facts. In other cases the Supreme Court has usually refused to intervene.

On August 19th an attempt was made to appeal directly to the United States Supreme Court in an effort to have that body review the whole record. The execution was to take place, however, before this appeal could be heard. Counsel, therefore, requested a stay of execution from the three available Judges of the Supreme Court, Justices Holmes, Brandeis and Stone. Justice Brandeis refused to pass on the matter on the ground that his wife and daughter had been interested in the case. Justice Holmes and Justice Stone agreed that there was no prospect of the Supreme Court's being willing to take the matter up and that therefore they were not justified in granting a stay of execution.¹

¹ See Chapter IV, pp. 178 to 182.

At the last minute effort was made to obtain another respite from the Governor and to get the Department of Justice to open its files. As has already been said, the files were never opened.

On Sunday, the 21st, the day before that set for the execution, after large crowds had gathered and pickets had paraded, the Boston police put a stop to all meetings. Vanzetti's sister arrived from Europe and, with Mrs. Sacco, visited the condemned men in Charlestown jail. On the last day the Governor remained in his office all day receiving messages and visitors. Officials of the Federal Council of Churches wired that it "would shock the moral sense of the nation to allow their execution tonight"; President Green of the Federation of Labor made another effort to obtain commutation. The Governor is reported to have said to one group of visitors:

"I would be sorry to see any of you leave this room believing in the innocence of Sacco and Vanzetti. I can answer any question you may ask me about the case and convince you that they are guilty."

Around the prison elaborate preparations were made. A large section of the town was closed off and people living within this area were kept in their homes as though an air raid were in progress. The prison was barricaded, machine guns bristled, searchlights glared. Throughout the city the excitement grew more and more intense. Near the State House over one hundred and fifty persons were arrested for picketing, among them Edna St. Vincent Millay, Lola Ridge, John Dos Passos and the septuagenarian Professor Ellen Hayes of Wellesley. Outside the barred area around the prison great crowds gathered. Almost, Boston seemed besieged.

On the eve of the execution Mr. Thompson, Mrs. Sacco and Miss Vanzetti visited the prisoners. Medeiros had his sister with him. Mr. Thompson made a record of his conversation with Vanzetti which was published as an appendix to the book of letters written in prison by the defendants.¹ This record shows Vanzetti to have been interested in the cause of anarchy to the end.

Medeiros was executed first of the three. According to the only reporter present at the execution, Mr. W. E. Playfair of the Associated Press, Sacco cried "Long live anarchy" in Italian, and then said in English: "Farewell my wife and child and all my friends. Farewell mother." Vanzetti was the last to die. Speaking calmly and slowly he said, first to the Warden, Hendry, and then to the others present:

"I want to thank you for everything you have done for me, Warden. I wish to tell you that I am innocent and that I have never committed any crime but sometimes some sin. I thank you for everything you have done for me. I am innocent of all crime, not only of this, but all. I am an innocent man. I wish to forgive some people for what they are now doing to me."

The warden was so much affected that he could hardly speak the words required by law to pronounce the death. Governor Fuller remained in his office to receive the report that the executions were accomplished.

¹ The Letters of Sacco and Vanzetti, New York, The Viking Press, 1928, pp. 398 to 406.

II

THE TRIAL FOR MURDER

- a. The Selection of the Jury.
- b. The Prosecution's Case.
- c. The Defense.
- d. The Summations.
- e. The Charge.
- f. The Verdict.

THE trial for murder of Sacco and Vanzetti which arose out of the shooting at South Braintree took place in Dedham, the county seat of Norfolk County, Massachusetts, before Judge Webster Thayer. It continued from May 31st to July 14th, 1921. Frederick G. Katzmann was District Attorney, assisted by Harold P. Williams. Sacco's attorneys were Fred H. Moore and William J. Callahan. Jeremiah J. McAnarney and Thomas F. McAnarney appeared for Vanzetti.

The McAnarney brothers were well-known practitioners of Norfolk County. Thomas McAnarney was at the time a local judge, having been appointed in 1918 by Mr. Coolidge, then Governor of Massachusetts. Another brother, John W. McAnarney, who had a greater reputation as a lawyer than had the two first named, had originally been asked to take the case but had refused on account of the pressure of other business. Before his brothers accepted the case he interviewed the defendants and satisfied himself that they were innocent. From time to time he was consulted by the defense on matters of policy, being called on particularly to determine how far Sacco and Vanzetti should disclose their radical views.

The chief conduct of the case was intrusted to Mr. Moore, a Californian attorney of radical connections. He had acquired a reputation from his successful handling of the trial of Ettor and Giovanitti on a charge of murder which had arisen out of a strike in Lawrence, Massachusetts. Except for this one case Mr. Moore seems to have had no familiarity with procedure in Massachusetts. He was chosen as counsel by the radical group in charge of the defense and was always disliked by Mrs. Sacco.

Upon the very threshold of the case an attempt was made to induce Moore to retire in favor of William G. Thompson. During the selection of jurors Mr. Thompson appeared in court. He never took part in the trial, however, because Moore would not withdraw. After the convictions, when Moore and the McAnarneys did withdraw, Mr. Thompson took their places and remained in charge of the defense until the eve of the execution.

On the first day, May 31st, 1921, argument took place in the Judge's cham-

bers on a demurrer filed by the defendants. This was a claim that the indictments were legally insufficient because too vague. The point was not then, nor, for that matter, ever decided by Judge Thayer. There was also argument on a demand for particulars of the prosecution's claim, especially in respect to just how each of the defendants was supposed to have been concerned in the shooting. Sacco requested a separate trial on the ground that his association with Vanzetti would, because of the latter's prior conviction for the Bridgewater hold-up, result in prejudice against him. On these motions also the Judge reserved decision although he later granted to some extent, however, the demand for particulars, while denying altogether the demand for a separate trial.

a. The Selection of the Jury

Five hundred persons had been summoned as prospective jurors. These the Judge addressed putting the following five questions:

"1. Are you related to either party? That is, to either of the defendants, Nicola Sacco or Bartolomeo Vanzetti, or to either of the deceased, Frederick A. Parmenter or Alessandro Berardelli?

2. Have you any interest in the trial or result of these indictments?

3. Have you expressed or formed any opinion upon the subject matter alleged in either or both of these indictments?

4. Are you sensible of any bias or prejudice therein?

5. Are your opinions of such a character as to preclude you from finding a defendant guilty of a crime punishable by death?" [2]

In discussing the last of these questions Judge Thayer said:

"It is not a sufficient excuse that the service is painful, confining and distressing. It is not a sufficient excuse that a juror has business engagements and other duties more profitable and pleasant than he would rather perform, for you must remember the American soldier had other duties and he would rather have performed than those that resulted in his giving up his life upon the battlefields of France, but he with undaunted courage and patriotic devotion that brought honor and glory to humanity and the world rendered the service and made the supreme sacrifice. He answered the call of the Commonwealth.

"So, gentlemen, I call upon you to render this service here that you have been summonsed to perform with the same spirit of patriotism, courage and devotion to duty as was exhibited by our soldier boys across the seas, and let no juror decline this call of the Commonwealth excepting in such cases that he can swear in fact and in truth, before man and Almighty God, that his conscience will not permit him to find a defendant guilty of a crime punishable with death.

"In this age of freedom of thought and of speech an individual is entitled to have his own private views upon all social, religious, political and economic questions, but he should never bring them with him to the jury room, especially when they might operate in the least possible degree to the prejudice of either party, whether in civil or criminal cases, for the majesty

of the law and obedience to the law must be supreme and must control the individual opinion as well as the individual will, for, as has been many times said and truly said, 'This is a government of laws and not of men.' [3]

Discussing the third and fourth questions he advised the jury:

"The opinion or judgment must be something more than a vague impression formed from casual conversation with others or from reading possibly inaccurate and abbreviated newspaper reports. It must be such an opinion that upon the merits of the issue involved as will be likely to bias and prejudice a candid judgment upon a full hearing of the evidence. If one has formed what in some sense might be called an opinion but which fell short of exciting any bias or prejudice he might conscientiously discharge his duties as a juror. Or, in other words, are those impressions or opinions, whatever they are, of such a character that they would yield to the testimony that will be offered, and will the mind remain open so that such testimony will receive a fair, honest, intelligent and conscientious consideration.

"If the impressions or opinions are of this character, the juror is qualified. On the other hand, if these impressions and opinions are so strong and so deeply rooted that they will close the mind against the testimony that may be offered and will combat and resist such testimony, whether the same be in favor of the innocence or guilt of a defendant, then such opinions or impressions would absolutely disqualify a man from jury service.

"Again, the mere reading of newspapers which contain the history of an alleged crime does not disqualify a juror, even though a slight opinion may have been formed thereby. Nearly if not all intelligent men naturally and necessarily read the newspapers. This becomes educationally imperative in order to keep in touch with not only the affairs of one's community but also the affairs of the world. Reading the newspapers should play an important part in the intellectual life of every human being who is able to read, and may the day never come when only those in the determination of important cases can sit as jurors whose brain has remained in that state of darkness that it has never absorbed the knowledge, wisdom and information contained in our daily press.

"No, gentlemen, it is not a question of reading the newspapers nor the question of the formation of mere impression or a light opinion. The real test, mark you is this: Is the mind willing, voluntarily, freely and fairly, to allow the testimony to be offered and admitted to dislodge such opinion if such testimony reasonably demands such dislodgment in order that truth and justice may be established between the parties. If such is the fact, then the juror is qualified to serve, notwithstanding he has read the newspapers and notwithstanding he may have formed some opinion.

"On the other hand, if the brain is unwilling to dislodge such opinion, of course the juror is disqualified." [5]

The examination of the jurors was, in accordance with Massachusetts practice, conducted by the Judge. On the second day it appeared that a certain Ripley had been a client of the assistant prosecutor. Ripley was nevertheless accepted as a juror and was later named foreman. When a large number of those selected were disqualified because of age or defect of hearing the Judge sharply criticized the officials responsible for making

up the lists. On June 3rd, after only seven jurors had been selected, the entire panel of five hundred was exhausted. One of the talesmen excused was Harry Dolbeare; the reason given for his rejection was prejudice because he had, on the day of the shooting, seen an automobile drive past him after the murder. He later appeared as a witness against Vanzetti.

When the first panel became exhausted discussion arose as to the proper method to be pursued in calling additional talesmen. The defense contended that it was entitled to receive a list of these just as though they constituted an original panel. The prosecution claimed that the law authorized the bringing in of additional persons from the street. The Court directed the Sheriff to summons two hundred men for the next morning, leaving the method of so doing to the discretion of that official.

On Friday, June 4th, these two hundred men taken from social meetings or their beds reluctantly appeared in court. The same questions were put to them and the same explanations made as in the case of the original panel. Defendants' counsel objected to the manner in which these men were selected on the ground, especially, that the selection had been arbitrary. There was considerable discussion between counsel and the Court, an excerpt from which follows:

"THE COURT. That is a question of fact that you will have to prove with me.

MR. THOMAS McANARNEY. Then we will have to call the deputies.

THE COURT. If you think it is worth it, go ahead. I will make a finding on it.

MR. THOMAS McANARNEY. I think that is the only way to save that question properly, unless it is admitted.

THE COURT. Well, I thought I went as far as you were entitled to, that is, that they used the jury list in the selection of men whom they summonsed.

MR. THOMAS McANARNEY. That they took a jury list, at least in some cases.

THE COURT. I am going to let you, that they used that list, jury list, and with a view of selecting certain persons here, because you are trying to put it in a state of prejudicing yourself and help the Commonwealth.

MR. THOMAS McANARNEY. No, I disclaim that.

THE COURT. Then I put it as it is and fair as it is.

MR. THOMAS McANARNEY. What ought we to claim, your Honor?

THE COURT. That is, that they used the jury list and from the jury list they made their selection of jurors? I am not going to let it go the other way unless you——

MR. THOMAS McANARNEY. I agree with your Honor now: took the jury list and from that made selections.

THE COURT. That is what I have said several times.

MR. THOMAS McANARNEY. Then we agree on that." [23]

Mr. McAnarney demanded the right to have certain questions put to the jurors. The Judge stated his refusal of some of them as follows:

"THE COURT. . . . I will take care of question 10 in my charge, and that refers to the question, that question is, 'Are you prejudiced against Ital-

ians?' . . . No. 12, 'Is the juror an employer of labor?' I refuse. No. 13, 'If the juror is an employer of labor, does he employ union help when union help is available?' refused. No. 14, 'If the juror is an employee, is he a member of any union?' refused. No. 15, 'Is the juror opposed to organized labor?' refused." [25]

During the examination of these jurors one was challenged because he had talked with one of the officers in charge of the case. When he said he could give a fair verdict on the evidence the challenge was overruled, but the Judge excused him, saying he wanted no complaint of prejudice. The Sheriff was instructed to keep from the jurors all newspaper comment on the case in both editorials and news columns.

After the twelfth juror had been accepted the Sheriff and his deputies were examined in the absence of the jurors as to the method they had adopted in selecting the additional two hundred talesmen. The Sheriff said he had given his deputies no instructions and that he had acted in good faith in selecting certain towns to which they were to go. THOMAS P. MURRAY, one of these deputies, testified:

"How did you select the 20 names?—Well, I got right around in this region of the town where I knew there were residents, substantial men and intelligent men, men who would be eminently qualified to serve as jurors, and I went for those. I think we made a pretty good job of it.

Yes, I hear you did. You did not use any jury list or assessor's book, anything of that kind, did you?—In order to test the accuracy of the names among the return of the names, you know. Of course, would not want to have John Jones, John Smith.

What is that, Mr. Murray?—Wanted to get the name accurate, and in order to make a proper list I used the voting list and had a copy of the jurors' list as prepared by the Selectmen, which gave me their occupation. I knew the men in most cases, but wasn't familiar with their occupations." [43]

Some of the men, as described by deputy WILLIAM WRAGG, had been taken from a Masonic meeting:

"What did you do to get those fifteen men here?—I went there and I went from house to house. It was late when I got my instructions. I was over at Needham; when I got my instructions it was quite late, and I went around and found most everyone in bed, couldn't find anyone on the streets, and I got a friend of mine who went with me who knew all the parties in Needham, and I got in touch with them and summonsed them in the name of the Commonwealth to be here this morning to serve as jurors.

Did you have any list?—No.

Or assessor's book, anything to guide you?—No list or no assessor's book. I had a jury list, but all the names were not on the jury list. It was sometime before the list was made up. [41]

Some people you brought in here were not on the jury list at all?—No, some of them were not.

And some were?—Yes.

Something was said about going to the Masonic Hall and getting several men there. Was that in Needham?—That was in Needham.

Did you do that?—I did.

How many did you get there?—Nine.

How many did you get in the whole town?—Fifteen.

Nine from this Masonic Hall?—I did. A great many of them I got I was acquainted with, personally acquainted with.

What say?—Quite a number I got I was personally acquainted with them.

I don't doubt it.—Most of them, in fact.

These men you did finally summons in here were men that either you or this friend of yours were acquainted with and knew?—I knew them, yes. There was seven or eight perhaps I wasn't acquainted with.

Or your friend did.—Oh, I questioned them before I summonsed them. They were citizens of Needham and afterwards then I summonsed them to come here.

THE COURT. Did you select these men in good faith with any view of showing any favor to either side?

THE WITNESS. Not any, not any favors whatever. Simply as my duty, as I was directed to do. There is one correction perhaps I ought to make in reference to the Masonic Lodge, technically Masonic Lodge. It was a public meeting in the town hall. It was a Masonic gathering, but the meeting was in the Needham town hall." [42]

ALBERT FALES, another deputy said:

"How did you go about it to do that?—I think I sat down in the Sheriff's room, our room out there, and wrote out a list of perhaps 8 or ten names, and as I rode to Norwood I thought of some more and when I got there I went to see some of them at the houses and some at home and some on the street.

How many did you select, you say 15 or 20?—Twenty-two, I think. Twenty, I guess. [43]

And the selection of these names or men was entirely left to you?—Sure.

And you picked out such men as you saw fit?—Sure.

And I take it, men that you knew?—As a rule, yes, men that I knew." [44]

Upon the completion of this testimony Mr. Moore challenged all the jurors so selected on the ground that the method adopted was not in conformity with the law. Judge Thayer promptly denied the challenge.

This examination of the deputies had continued until late into the night and was not concluded until half past one o'clock in the morning. The jurors had been allowed to go to sleep; but they were awakened at the close of the examination of the deputies and brought into the court room to be sworn. First they were briefly addressed by the Judge, who thus concluded his remarks:

"We are now in a Massachusetts court. These men are going to be tried in the court room. They are not going to be tried anywhere else, nor by any other people outside of this court room, and if anybody undertakes to try these cases elsewhere by doing anything that will prejudice in any way the rights of the Defendants or the rights of the Commonwealth, they must suffer the consequences, for they certainly will be severe.

"Massachusetts guarantees protection to all citizens. It makes no odds where they were born; it makes no difference what their financial, social or religious standing may be. It is one of the boasts of the American law that the rich, the poor, the high, the low, the learned, the ignorant, all shall receive the same rights, the same privileges, and we must see to it that a trial of that kind is held according to American law and according to American justice and nothing must be done by anybody in any way whatsoever to mar or impair a fair, honest trial. The defendants are entitled to it. The Commonwealth is entitled to it, and as part of the government of this Commonwealth, it is a duty of this court to see that both parties have exactly that kind of a trial." [47]

These are the names, occupations and places of residence of the jurors chosen:

Wallace R. Hersey, real estate dealer, Weymouth
John E. Ganley, grocer, Avon
Frank R. Waugh, machinist, Quincy
Frank B. Marden, mason, Weymouth
Walter R. Ripley, stockkeeper, Quincy
John F. Dever, salesman, Brookline
Louis McHardy, mill operative, Milton
Harry E. King, shoe worker, Millis
George A. Gerard, photographer, Stoughton
Alfred L. Atwood, real estate dealer, Norwood
Frank J. McNamara, farmer, Stoughton
Seward B. Parker, machinist, Quincy. [2320]

Court adjourned at this point until Monday morning, June 6th. On that day it was arranged that the jury be taken to the scene of the crime and the surrounding country, and that the defendants need not accompany them. Before the party went off Mr. Moore had an argument with Judge Thayer about the bill of particulars in which he asked for a ruling on all the items:

"MR. MOORE. I can explain to your Honor exactly what they are, without reading them in detail.

THE COURT. I would not take that from any lawyer living. I insist on having the bill of particulars before me and reading each request, and I will take that during the night, if you want, take it home with me, and I will date them as of this morning.

MR. MOORE. Yes, I think that would be—I do not want to consume the Court's time now.

THE COURT. I thought I was granting something better, because most of

them I will pass on them at once, and that is the end of them, and they have been disposed of and they won't be renewed, either, I tell you, when I examine them tonight." [52]

After this discussion the indictments were read. They were two in number, identical except for the name of the murdered man. One of them is given here:

"COMMONWEALTH OF MASSACHUSETTS

"NORFOLK, SS.

At the Superior Court begun and holden at Dedham within and for the County of Norfolk, on the first Monday of September in the year of our Lord one thousand, nine hundred and twenty, the jurors for the Commonwealth of Massachusetts on their oath present that Nicola Sacco of Stoughton, in the County of Norfolk, and Bartolomeo Vanzetti of Plymouth, in the County of Plymouth, in the year of our Lord one thousand, nine hundred and twenty, at Braintree, in the County of Norfolk, did assault and beat Alexander Berardelli with intent to murder him by shooting him in the body with a loaded pistol, and by such assault, beating and shooting, did murder Alexander Berardelli, against the peace of said Commonwealth and contrary to the form of the Statute in such case made and provided.

A true bill,

FREDERICK G. KATZMANN, JOHN B. WHALEN,
District Attorney. Foreman of the Grand Jury." [53]

Before the jury viewed the scene and territory of the crime Mr. Williams addressed them and described the places they were about to visit. The trip occupied the rest of the day. Accompanied by the Judge and by counsel the jury traveled by automobile to South Braintree where the approximate locality of the shooting was pointed out, although counsel could not agree among themselves exactly where it had actually taken place. The drive continued following the supposed route of the bandit automobile through Randolph to West Bridgewater. There the jury was shown the Johnson house, the Coacci shed, and the spot at which the abandoned car had been found. They were also taken to the Matfield crossing not far off.

b. *The Prosecution's Case*

Thus the trial itself started on Tuesday, June 7th. The opening statement for the prosecution was made by Mr. Williams:

"We have now cleared away the preliminaries of this case and are prepared to introduce real evidence upon which you will base your verdict. We have had a hard week. We have gone through the struggle of getting a jury, as you gentlemen know. Some of you, the ones who were early chosen, have witnessed part of the struggle. You twelve men have the satisfaction, if it

is any satisfaction—and it must be in a serious case of this kind—of knowing that out of some seven hundred men summoned you have been selected by both parties as being entirely satisfactory to both parties to try the issues involved in this case. They will be difficult issues. Difficult questions will arise. It must give you a firm foundation to start on in realizing that you are starting out, not by being imposed upon the parties, but as being acceptable to both parties.

“We have had some evidence introduced, and that evidence is the evidence of your own senses that you observed yesterday in a tiresome and dusty route. Whatever you saw yesterday, gentlemen, connected with this case, is evidence for you to consider. It is in the case now and cannot be taken out. The only way I can see that it can be altered or is likely to be altered is by other evidence by word of mouth showing that some of the localities, some of the situations which you observed yesterday, have been changed by subsequent events, by building, by removal, by the usual courses of nature.

“The crime which we are charging here, and which we are about to try, took place on the 15th day of April. This is the early part of June. I presume there are some differences in foliage, Mr. Foreman, which you may have to take into account, if the observations of any particular witness is mentioned. Possibly a difference in the state of the sun, in shadows that are cast, and things like that, may enter into the case, and, so far as that is concerned, you will note the differences which would ordinarily take place between the 15th day of April in any year and the 5th or 6th day of June.

“We now come down to the evidence which is to be presented in court and is to be presented by word of mouth. Let me pause a moment here to speak of what is called circumstantial evidence, because I have used the term ‘word of mouth.’ Some of you have noted as the jurors were examined here on the question that some of them objected to circumstantial evidence. In cross-examination by his Honor, none of them really knew what circumstantial evidence was. It is all, gentlemen, presented to you by word of mouth. It comes directly from the mouths of the witnesses on the stand. The difference between so-called direct and circumstantial evidence is that in direct evidence the witness testifies directly to what he has seen, the real point at issue. If it is by stabbing he says: ‘I saw that man stab.’ The witness to the circumstantial evidence simply testifies to the circumstances, from which circumstances you, as the judges and jurors, draw the inferences which you would naturally draw from those circumstances. [62]

“To use the illustration which I have just used of a stabbing, a man may see a shadow on the window or the window pane of a house with an arm raised, the shadow of struggling men. He may go into the room afterwards and see a knife on the floor. He may see the victim lying wounded or dead upon the floor. Those are circumstances which he may testify to, and when he testifies to them on the stand it is for the jury to say what is the natural and reasonable inference to be drawn from those circumstances, and if the inference from the circumstances that have been described naturally and reasonably—and I may say necessarily—follows, you are just as sure of your judgment as to what happened as if the eye witness himself had been in the room.

“Now, gentlemen, before we begin on this case, I want you to appreciate

one thing. The sole responsibility does not rest on you. We are starting in, and there is no use in concealing it from ourselves, we are starting in on a very serious and a very solemn undertaking. We are starting in on the trial of a case where the lives of two men who are now in the court room may be involved. Nothing could more impress us with the seriousness of what we are about to do. And the attorneys for the Government are as acutely conscious of the seriousness of this as you can possibly be. It is their duty to present evidence to you, but no pride of profession, gentlemen, no desire to win a case, I assure you, will influence them in presenting the evidence. They realize to the full what they are doing, and what the evidence which they are responsible for in the way of presentation means, and they share with you the burden of trying the case.

"His Honor, likewise, in presiding in this trial, shares that, perhaps doubly so, because if there is a conviction it is upon him to pronounce sentence and shares with you the burden of trying the case. We are all here, gentlemen, with one aim in view and one aim alone, with the utmost seriousness to search for the truth in this case, and if we find it to declare it with the greatest courage which we possess.

"And gentlemen, this crime, this alleged crime—because until it is proved it is only alleged—took place, as you have been told before, on the 15th day of April, 1920, at about three o'clock in the afternoon. The place was South Braintree, the southerly part of the town of Braintree in Norfolk County.¹ On that day money had been received by Slater & Morrill, shoe manufacturers, occupying that upper factory near the South Braintree Station, for the purpose of making out their pay roll, and paying their employees.

"The money came out by express—I believe it was the American Express—early in the morning, and was received by the local agent of the American Express at the Station shortly after nine o'clock in the morning. About 9.15, if I am not in error. The amount involved was some \$15,776 and odd cents. The local express agent, a Mr. Neal, with his driver, received it at the station and took it across to his office, which is in the part of the Slater and Morrill building which is nearer the cobbler [63] shop. If in the mass of things which were brought to your attention yesterday you remember the sign, 'American Express Company,' over that nearest door to the cobbler's shop, you will know just where I mean.

"He took it over there. I believe there was other money in the box which he received from the railroad company, put in a separate box what was due or what was to go to Slater & Morrill for the purpose of transferring it to the local paymaster of that Company. Naturally, he was accustomed to watch very closely anybody around the building or between the station and the house because of the amount of money which he had the custody of, and on that morning as he went into his office he noticed standing in front of the building, and you remember how that driveway comes up close to the curbstone, perhaps raised a little from the general level of the Square, he noticed a large, black automobile, apparently a seven-seater, standing in front of his door or between his door and the Slater & Morrill door, with its engine running, and he observed a man standing on the sidewalk or near the car, a rather slight man with a light hat, emaciated, yellowish face, with some kind of clothes, the exact description of which I do not have in mind. His attention, for some reason, was attracted to that man standing,

¹ See plan facing p. 342.

and to the car, and the man looked at him closely. I refer to Neal, as he went in.

"Neal went into his office and changed the money and within a few minutes, perhaps ten or twelve minutes, came out again, with the money for Slater & Morrill. At that time the man was still standing there by the car. Neal came out of his door and walked northerly to the middle entrance of the block or building and went into the Slater & Morrill offices. The man watched him, and as Neal went along, or went into the middle entrance, the man got into the machine. The engine, if you recall, was still running, and drove in a northerly direction. That is, up toward Holbrook Avenue. If you remember, we went up to the corner of Holbrook Avenue. And that was about 9.30.

"The money was taken into the Slater & Morrill Company. The pay envelopes were made up by the pay mistress, or master, I think it was a pay mistress. The exact amount was put into the envelopes, and if I am correct, the moneys so allotted were put into two boxes, perhaps two and one-half feet long, a foot and a half deep, a foot wide, something like that, and remained there, or, at least, the time was taken up in putting the money into the envelopes, until early in the afternoon.

"The acting paymaster at that time, the man who had to actually distribute the money, was Frederick A. Parmenter. The man employed to accompany him, and I say 'accompany' because the paymaster had to go from factory No. 1 up there by the station down the hill to factory No. 2. The man who was employed to guard the paymaster was Alessandro Berardelli, a man of Italian descent, and at three o'clock, or about then, Mr. Parmenter and Mr. Berardelli left the Slater & Morrill factory with these boxes to make the payments in the lower factory. They were seen leaving [64] the middle entrance of the Slater and Morrill factory, each with a box filled with the money and the pay envelopes. They were seen to proceed across that square there, across the railroad tracks. They were watched across the further track and were seen by one or more witnesses to stop and talk with someone across the tracks. Berardelli, according to one witness, at least, had his box in his right hand. Parmenter had his box in his left hand. And Parmenter at some time shifted the box, which was a heavy box, from one hand to the other. Whether it was from the left to the right, or right to the left, I cannot now tell you, and in that position walking relatively side by side they passed from the view of occupants of factory No. 1; and I am calling the upper factory factory No. 1 for our purposes here, down Pearl Street, behind that high fence which you saw there, along by the water tank, the high board fence. The reason they were watched is, I assume, the natural reason that everybody is interested in pay-day, and they watched the paymaster going across the ground with the pay envelopes.

"The scene shifts from there, gentlemen, because of the passing out of sight of the witnesses in No. 1, and we slip down to the slope leading down from the railroad crossing down the hill back of Rice & Hutchins to the Slater & Morrill factory. Down there between the two telegraph posts, which you will remember were pointed out to you on the right in front of Rice & Hutchins factory were two men leaning against the fence on the right-hand side of the road. They were two short men, perhaps five feet, six or seven, rather stocky, described as perhaps being 140 and 160, in that

vicinity; caps, dark clothes, caps somewhat lighter than their clothes, of apparent Italian lineage.

"They were leaning against that iron fence which was on the right. There was one man up between, at least between the two telegraph poles. How far up the evidence will disclose. The other man at some time at least was further down the line towards the Slater & Morrill factory, down nearer to the end of the fence, though at some time he apparently came nearer this fellow who was on the fence, and as various witnesses walked up the street just prior to the paymaster and his guard coming down and walked up by these gentlemen on the fence, they were leaning there. Parmenter and Berardelli stopped and talked with a friend of theirs just after leaving the railroad crossing and after so talking they proceeded down the hill by the Rice & Hutchins factory, Berardelli apparently a little in advance. They came down to where the two men were, or to where the one man was, and the other man approaching, and these two men on the fence stepped out and approached them. There is some testimony that one of the men seized hold of Berardelli, shots were fired by these two men. Berardelli fell wounded, Parmenter ran across the street and fell wounded on the other side of the street.

"On the other side of the street at that point where you now see that fine-looking brick restaurant was an excavation where fifteen or more, [65] perhaps less, Italian laborers under the head of one or more foremen were engaged in excavating for the cellar of the building which you now see. The excavation extended over what is roughly the site of the present building up by the water tower where Mr. Katzmann had you stop yesterday, and where you saw one or two stray bricks was a pile of bricks at that time to be used, I take it, in the foundation work of the cellar.

"The windows of Rice & Hutchins were closed. They were those glazed glass windows and at the time they were closed. Some of the windows in the factory further down the street, of the Slater & Morrill factory, which looked up towards the scene of the shooting, were not glazed, but the sun at that time was so striking into those windows that it was difficult for any of the workers in the Slater & Morrill building to see through the glass with the sun shining or to the scene of the building.

"There was across the street, as you remember from the view, a house in back where you walked up a little lane, which is now in back of the present building occupied by Mrs. Nichols; there was the Colbert house, which is the first of the houses as you turn up that little street to the left which bends up there. I think it is Colbert Avenue. It is the first house on the left. The Colbert house was the second house, and those houses down the street.

"Berardelli fell mortally wounded and died shortly thereafter. Parmenter died the next day in the Quincy Hospital. Autopsies were held on the bodies of both men, and the autopsies, which, as you know, is a post mortem examination of a man's body, when he is cut up, his insides taken out, and so forth, and they find what is the matter. Berardelli had four bullets in him at the autopsy. Parmenter had two. Berardelli's bullets were roughly in these positions:

"A bullet had gone through his arm, through the left side of the body and lodged somewhere in the right part of his chest. A bullet had gone in here [indicating] a little lower down and had apparently skirted the ribs and was

lodged somewhere in the front of his body. Another bullet had entered on the left back side, still further down almost to what they call the crest of the ilium. That is, the crest of the pelvic bone, down there, and had gone through and lodged somewhere in the front part of his body. A fourth bullet, gentlemen, had struck to the right of the shoulder blade there—I believe called the clavicle—the right of the shoulder blade there, gone in there, traversed diagonally the whole body of the man, through the large vein in the middle of the body, which is called the aorta, and lodged, gone through the larger part of the intestines, gone through here [indicating] and lodged down in the right abdomen, in some way. That was the fatal bullet. The other bullets might have eventually caused his death, but that was the bullet that then and there did cause the death, this transverse bullet that entered behind the shoulder and went down through the body and lodged in the abdomen.

“Parmenter had a bullet also from the left, which entered something [66] like this [indicating], a little below and to the left of the nipple, and went into, perhaps half way through, the body. He also had a wound in the back somewhere near the belt line which came out on the front part of the body, went clear through him. One of the bullets came out and was found in Parmenter’s clothing, after the shooting, in the Hospital. Whether it was the bullet which went in here [indicating] and came out, or the bullet which went into the back, I for the moment do not remember. One of the bullets remained in him. The other was found in his clothes. I will say now, gentlemen, they were steel-jacketed bullets, bullets which had been fired from an automatic pistol.

“Why I describe those wounds to you at this time and interrupt my tale of the shooting is this: You will note that these wounds, one, two, three, on Berardelli and one on Parmenter, entered the bodies of these men from the left, or from the left back. You will also recall that the picture we have at the present moment, at least, as these men go down Pearl Street, is the bandits—if I may call them that—on the fence to the right and the men going down with their right sides to the bandits.

“I may say now that in an affray of this kind—perhaps this isn’t correctly called an affray, because the shooting was all one-sided—but in a matter of this kind men and women are likely to see things from different angles and in a somewhat different light. I shall not this morning attempt to tell you, gentlemen, positively who fired this shot, where it was fired from, what happened and what this man did or what that man did. It would be foolish for me to do so. You will hear a great number of witnesses as to the shooting. It will be for you to say whether or not from the evidence, and there will be evidence to support these various views, whether or not as these men went down here the men on the fence came around behind them and shot them from over in the street side on the left-hand side, or whether they stepped out in front of them and shot them again from the left, or whether, and this, perhaps, seems the more reasonable conclusion from the evidence as I have heard it, that as these men came down the street they were attacked by the first man, at least, on the fence, who seized Berardelli—Berardelli, you remember, was slightly in advance of Parmenter—that Berardelli turned into the fence to meet his assailant or was turned in by the force of the attack, that Parmenter, who was following him and rather

close to him and naturally also turned in towards the fence, where the attack came from, and that the other man, who was some little distance away, started out in the street and, as the attention of the two victims was taken by the man on the fence, shot them in the left-hand side, three shots in Berardelli, perhaps not all then, but at least two then, and one in Parmenter.

"As Parmenter was shot, he dropped his box and turned and ran towards the excavation over there. One of the bandits followed him across the street and as he ran shot him in the back on this belt wound which I told you about. Poor Parmenter fell across the street over by a [67] double-horse team which was backed up into the excavation. Berardelli dropped, as he was shot, in the gutter, on the same side of the street where he had been walking. Ten or twelve or fifteen, or perhaps twenty feet, on the crossing side of the lower telegraph pole in the gutter, and as he fell and as he was in this position [indicating] on his knee—I won't go way down—or in a still more prostrate position, one of the bandits, a fellow who had lost his cap, a short, swarthy man, with his hair brushed back, slightly thin on the temples, was standing in front of Berardelli with a pistol, and fired two shots at the prostrate man. That man, gentlemen, who shot Berardelli as he was on the ground, is described and identified as Nicola Sacco, the defendant on the left.

"While this was going on—you have got six shots in the man. There were presumably more, perhaps seven or eight or nine at that time. While that was going on, this big, black car which Neal alleged he saw early in the morning, was down below the Slater & Morrill factory. It was down there somewhere near the last house that you saw down below on the right-hand side, the Antonio Scabia house, or perhaps a little further down there in the swampy land, and as this shooting went on that car crawled up the street. As Berardelli fell dead—and he died within a few minutes,—a bloody froth from his mouth,—as he fell there, *that car approached driven by this light-haired man with an emaciated face*. It was a seven-passenger 1920 Buick with a top, that is, the canvas top up, with the back up and with the curtains up on both sides, or at least mostly on one side.

"That car has three sets of curtains behind the front seat. It has a little triangular curtain in back. Here [indicating] is the seat. It has that little triangular curtain, something like that [indicating] in back. Then it has a middle curtain. Then it has a third curtain which takes it up to the front seat. Those strips of curtain, which you are doubtless familiar with, at least on the right, those three, the curtains were up, though the front curtain, which was up, had been flapping and it was not caught on the bottom, and they were up to some extent on the Rice & Hutchins side. When I say 'going up the right' I mean the right going up the street.

"There were two men in the car, the driver and a man we cannot describe, in the back seat. The car crawled up to the scene of the shooting. The two bandits, the man who had shot Berardelli when he was on the ground and the fellow who chased Parmenter when he was across the street, came back, took up the two boxes, and piled them into the car.

"There is some evidence that there was another bandit on the other side of the street over behind the brick pile. A shot was noticed coming from that distance, though I will say now the evidence is rather hazy as to that bandit over there, but there is evidence that three bandits, whether it was the

man who was over in the brick pile or not, came across the street, and piled into the car; there then being five men in the car, it proceeded up the street to the crossing. [68]

"As it went up the street a man in the Rice & Hutchins factory, I think it was Rice & Hutchins, may have been Slater & Morrill's, got the number 49,783 on back. As they went up the street they noticed that the rear window of the back, that isinglass window, perhaps that long [indicating], that wide, and so forth, was out, and a gun or the barrel of a rifle or shotgun protruded from the window in back.

"As they went over the crossing, the gate-tender¹ was at his post in the little shanty on the other side of that track. The gates were up. He had heard the shooting and at the same time he heard an approaching train. Either induced by the shooting or by the train he ran to close that gate where I stopped, Mr. Foreman, yesterday and asked you all to gather around me. And he started to wind his crank to lower that gate. At that time the car was just entering upon the other side of the crossing, and the men in the car hollered at him and intimidated him so that he did not close the gates, and they proceeded up across the crossing. As they came across he noticed on the front seat an Italian with a moustache, I believe with a slouch hat on, whom he identified as the other defendant, Bartolomeo Vanzetti. He stood there, perhaps crouched behind the gate, and the car came by him right over the crossing where he was standing yesterday, and proceeded up the street.

"By that time the shots below the crossing had, first, attracted a lot of attention. People had come to the window of Slater & Morrill's factory No. 1. men inside the cobbler's shop on the crossing had come to the door, there were others scattered around the street that had been attracted to the shooting, and as the car came up from the crossing going rather slowly—it had not got under its real headway at that time—a man seated or crouched or standing between the right front seat of that car, leaned out under that flapping curtain which you remember in the right-hand side of the car, and shot at the crowd until the slugs in his pistol were exhausted.

"People up in the corner window of Slater & Morrill's factory where you went yesterday—Miss Devlin and Miss Splaine—looked out of the window right down on that car as it went past them and will tell you that that man who was leaning out under the curtain with his revolver raised, with his cap off, and shooting at the crowd along the street, was the defendant Nicola Sacco. Further up the street he was identified by another witness.² And Neal will tell you that that car going up the street at that time was the same car that he had seen in front of the American Express office earlier in the day.

"The car, gathering headway, finally, of course, reached the corner of Hancock Street by the drug store, turned down Hancock Street to the left. As they turned down, the occupants of the car scattered rubber-headed tacks along the road, a good many of which were picked up. Whether we have any now to show you, I do not know. But they scattered tacks along the road, and gaining speed all the time went down as far as the crossing, the last stop which we made yesterday. Instead of going over the crossing, [69] they made that hair pin turn start up toward South Braintree. And that is

¹ Levangie.

² Goodridge.

literally a hair pin turn, if you remember. They came down here on Pearl Street and beat it right back up to Pond Street. When they get back to Pond Street the witnesses will tell you they went out westerly on Pond Street over toward Oak, gradually emerging into Granite where these two streets come together.¹

"They were observed by witnesses where we stopped up on the higher land on the South Braintree side of Oak Street. They got to Oak Street. They turned a still more westerly direction down Oak Street. I do not know how much you realized yesterday, coming back in that cloud of dust. It was hard to see anything, but I think you do remember perhaps coming up Chestnut Street that I pointed out to you when I went back. They went out Oak Street over to North Main Street, which is that main highway, being the continuation, I am told, of Randolph, going towards Randolph, crossing down Chestnut Street, over into the Tower Hill district. You remember that Tower Hill church if you happened to see it.

"They there got on the turnpike, that long straight rough road, an old turnpike, just as direct as the crow flies, and went down through North Stoughton towards the Bridgewater. They were last seen there on the hill, the South Braintree side of North Stoughton Square where I stopped and asked you to remember the hill which we were going down, and the front, the first part of the number plate was obtained there, the '49.' I believe the whole of it was obtained, but in writing it down it has been lost by the witness and he at the present time can only remember the '49' part of it.

"These witnesses will tell you of this big car with four or five men in it speeding westerly and southwesterly with the window in back out, covered with dust at that time, and with this number plate.

"We next check them up south of Brockton Heights. Brockton Heights is that place where we first ran into the route when we came up from lunch. That is when Mr. Katzmann stopped and told you we would intersect the route, and below that they were checked up and the number taken, the great speed at which they were going at that time directing the attention of those along the way.

"From there on we lose track of them. May I say at this point that they were checked up on North Pearl Street below Brockton Heights somewhere around a quarter of four, around 3.45 or 3.50, possibly 3.40. I won't be sure as to the time there.

"We next find them at Matfield Crossing where we went yesterday. The crossing-tender,² the then crossing-tender noticed them coming down the grade there towards the crossing at the same time that a train was approaching, and ran across the crossing with his stop signal, that big signal with the 'Stop' on it, this big car and these men in it, and they stopped. He held them there until the train got by. And then the man who was on the front seat and whom he describes as Bartolomeo Vanzetti [70], said: 'What to hell are you holding us up for?' He made no reply, or, if he did, I do not recall it. They started across the crossing, he in the meantime going back towards his shanty. When they got to the other side and were just straightening out to proceed, Vanzetti again said: 'What in hell are you holding us up for?' And they went off, either in the direction that we went, or in the other direction. You remember we went in a triangular move there, and came back to Matfield Crossing. They went one of those directions.

¹ See map facing p. 534.

² Reed.

"They were gone about three minutes, possibly a little longer, and came back and over the same crossing, the same crowd and the same machine, and the crossing-tender observed them again coming back with Vanzetti in the front seat, and they went up the little hill there which we came down, and later went up and disappeared from sight, and there we end, gentlemen, the view of the bandits on the afternoon of April 15th.

"The shooting was at about five minutes past three. They are checked up on North Pearl Street around quarter of four. The Matfield Crossing incident took place around 4.10, and there we leave them for the time being. Meanwhile, back in South Braintree, they were taking care of the unfortunates that had been stricken down. Berardelli was practically dead. A stretcher was brought out from the Rice & Hutchins factory, and he was removed to Mr. Colbert's house which I mentioned before, on that little side street. He was unconscious. There was some froth coming from his mouth, and he shortly died. I believe he died in the Colbert House. Parmenter was still alive. He was taken into the Colbert House. Some first aid was administered to him and he was subsequently removed to the Quincy Hospital. He died at five o'clock, five in the morning of the following day, April 16th, after an operation which removed the bullet which remained in his body.

"You will see, gentlemen, you will have shown to you the clothes that both the victims wore on that day. You will see the bullet wounds. You will have the unpleasantness of examining blood-stained garments. You will check up the holes in the clothes, the underclothes with the wounds on the bodies which will be described to you by the various medical witnesses.

"After the bodies had been removed, or probably before they had been removed, a cap was found on the road beside the body of Berardelli. Some empty shells were found on the road. I believe that is all that was discovered other than the bodies of the victims themselves there at the scene.

"Before the shooting had occurred and after Shelley Neal had seen this car in the early morning, that car was not unknown to the citizens of South Braintree. You remember at about 9.30 Neal saw it driving off northerly from in front of his office. Sometime after ten o'clock, perhaps half past ten, it was seen coming up Holbrook Avenue and turn into Hancock Street. You remember Holbrook Avenue and Hancock Street. And the gentleman who was on the front seat of the car at that time or was in [71] the car and was noted to be in the car by an intelligent and reliable witness¹ was the defendant Vanzetti.

"Now, where had the car been from the time that Neal saw it roll away from in front of his office at 9.30, at 9.30, to where this witness saw it coming up Holbrook Avenue between 10 and 11? Here is where East Braintree comes into this story. You remember East Braintree, the station we first took you to over east of the scene of the shooting. There was a gentleman² who took the train at Cohasset on that morning at 9.20, who got into the smoker, and it was the South Shore train that came up from Plymouth, Plymouth being the place where the defendant Vanzetti lives, and carries on spasmodically some sort of a fish business. This gentleman from Cohasset got into the smoker and sat down in the rear seat, on the rear cross seat on the left-hand side of the smoker, and across from him was a little

¹ Dolbeare.

² Faulkner.

side seat or a smaller seat in front of the men's toilet. You know how that rear seat on the toilet side is fitted into the smoker.

"And as they got to one of the Weymouths, the gentleman from Cohasset was attracted by the man across the way leaning forward and touching the man in front of him and saying: 'Is this East Braintree?' His attention was called to the description of that man who made that inquiry. The man in front said, 'No, this is not East Braintree,' and eventually the gentleman from Cohasset told the man who had made the inquiry that the East Braintree station was one or two or three stations ahead.

"They went along and they came to East Braintree, and the gentleman over across who had made the first inquiry was told that that was East Braintree, and he got up to go out, and he had two heavy grips or satchels, and I say 'heavy' because he acted as if they were heavy, and he was an Italian, he had an Italian look, and he had a moustache. He had an Italian accent. And he got off the train at East Braintree and got on to the platform and looked around and then walked up and down the platform or did something on the platform, nothing positive in character, and the train rolled out.

"And the gentleman from Cohasset will come into court and tell you that that man who got off at East Braintree station on the train that came from Plymouth on that morning arriving at East Braintree at about 9.50 was the defendant Bartolomeo Vanzetti.

"Now, what was the significance of Vanzetti arriving at the East Braintree station from Plymouth with his grips on that particular morning? You will recall the relation of East Braintree to the South Braintree route, and you will recall, gentlemen, what I have just told you of the witnesses seeing the car coming back up Holbrook Avenue sometime after ten o'clock with Vanzetti in it.

"There were two strangers, not in the car, but apart from the car, in around South Braintree that morning. They were seen up there leaning against the store, the drug store, which I called your attention to up in Washington Street, short foreign appearing men, dark clothes and caps [72], leaning against the window there. They attracted the attention of the owner of the building,¹ who will tell you that one of those men is the counterpart of the defendant Nicola Sacco.

"Further down the street they were seen later in the morning, around 11.30. The car was seen at that point, and at about 11.30 that car was placed between the two factories. That is, between the Slater & Morrill factory No. 2 and between Rice & Hutchins' factory, headed up the hill, and there were two men at that time working around the car, the pale faced, thin faced, emaciated faced driver, and another man, who was fooling around the car, and you will be told by a witness² that that second man who was fooling around the engine is the defendant Nicola Sacco or his double. Sacco was seen in the railroad station that morning at some time.

"Where was Sacco supposed to be this day? You naturally ask me, and I have told you that Vanzetti was a fisherman and peddled fish at times in Plymouth. Sacco doesn't come from Plymouth. He comes from South Stoughton, and he is a shoe worker. He works in what is called the '3 K' factory. I have no doubt some of you gentlemen are familiar with it, in South Stoughton.

¹ Tracy.

² Lola Andrews.

"Early in the week of April 15th—the 15th was Thursday as I recall—Sacco said that he might want to get off some day that week. Finally, he asked to get off on Thursday. He was allowed to get off on Thursday, and Sacco was away from his job in the 3-K factory all day Thursday.

"April the 17th came on Saturday—the 15th was on Thursday—and late in the afternoon of that day two men riding on horseback for pleasure went up that little wood road that we traversed yesterday, and there they found up there where we finally stopped, the furthest point we reached, with its head away from the street, if I am right, a 1920, seven-passenger, black Buick car with the top up, with no number plates on it, with the rear window, that long window of isinglass in back, out of it, and with a bullet hole in the right-hand side in back, shot from the inside to the outside, and that car there found is identified by the witnesses of the shooting as the car involved in the shooting which carried the bandits from the scene.

"The history of that car, briefly, is that in 1919 it was owned by a man named Murphy in Natick. It was stolen from Murphy on November 23, 1919, and was never traced until the time it was discovered in the woods. The numbers 49,783 which were on the car at the time of the shooting, but which were not on the car at the time it was found, were stolen from a man in Needham named Ellis sometime in the early part of 1920.

"We next hear of Sacco on the evening of May 5th. Perhaps it would be well to jump for a moment to the Coacci house which you viewed yesterday. That word, Coacci, is, I believe, spelt C-o-a-c-c-i—it is called the Coacci house because in the early part of 1920 it was inhabited by a family by the name of Coacci, and there lived at that house with the Coaccis a man by the name of Mike Boda. [73]

"Mike Boda had a car of his own called an Overland car, but sometime in the early part of April, the latter part of the winter of 1920, he was observed driving a larger car, not his Overland, but a larger car, around that part of the country of the description of this 1920 Buick. He was seen at one time driving it early in the morning. A large car with four dark complexioned men in it was observed several times driving up to the Coacci house on Sunday evenings and the men getting out there.

"After the South Braintree shooting police officers visited the Coacci house and the shed and they there discovered the remains of curtains which had been nailed over the four windows of the shed in which you went yesterday, and witnesses will tell you that that shed had been curtained. That is, the windows curtained for some time, a rough shed, with a rough floor and a rough interior, but for some reason curtained by curtains nailed over the windows, and they found inside evidence of the dirt floor—there wasn't all that wood in the floor at that time—of the dirt floor having recently been raked over, and later two officers found traces of a hole having been dug in that dirt floor and having recently been filled up, and they found marks of a car, not going straight into the door, but going in to the left, following the angle of that cut across the beam in front, which I particularly called your attention to yesterday.

"There was some talk with Boda, and then Boda for a time disappeared. But on May 5th Mrs. Simon Johnson, who first appears in this picture, was awakened by a knock on her door, and Mrs. Johnson lives in that little

house beside the railroad crossing on North Elm Street near Elm Square. You remember Elm Square, which we visited just before we went to the Coacci house, and you remember the little house by the railroad crossing up over the railroad, with a high fence there just before this, and that is owned by or occupied by Mr. Simon Johnson, who runs the Elm Square Garage, and Mrs. Simon Johnson is his wife, and Boda, when he left the scene within a day or two after the shooting, left his Overland car at Mrs. Johnson's Garage.

"Mr. Johnson and Mrs. Johnson were at home on May 5, and they heard this knock on the door, and Mrs. Johnson went down, and there she saw Mike Boda. She came out of the door of her house, you remember that little house there, with a bridge over the railroad track up a little higher there and a telephone pole this side of the bridge, and there was Mike Boda standing beside the telegraph pole, and down here on the Brockton side was a motor-cycle with a side car pointing toward Mike Boda, and with the light streaming on Mike Boda, and beside that motor-cycle and the side car was a man whose name is Orcciani, I think, from Hyde Park; and as she saw Boda standing there and as she saw Orcciani standing there, she saw two men come over that bridge by Boda on the other side of the road from her, and one of those men was Nicola Sacco, and he had with him his co-defendant, Bartolomeo Vanzetti.

"By reason of some pre-arranged plan, which it isn't perhaps competent [74] for me in this case to speak of, she went over to the Bartlett house,—the next house up towards Brockton, and you remember the distance she must have travelled to reach there,—she went up by the motor-cycle. It was turned toward Elm Square as I have told you, and as she went Sacco and Vanzetti followed alongside of her on the other side of the street where the railroad track is. She turned into the Bartlett house and was there for ten minutes, or about that. When she came out Sacco and Vanzetti were watching opposite the Bartlett house.

"She came out and went down on her own side of the street, and there was something said in a foreign language, she thought it was Italian, and they followed back with her on the other side of the street, and when she got back to her house the motor-cycle had been turned towards Brockton, and as she reached the house she saw Boda get into the side car of the motor-cycle, Orcciani get onto the motor-cycle and the motor-cycle went off towards Brockton.

"Later that evening a street car was proceeding up North Elm Street towards Brockton under the direction of a man named Cole, a conductor, and on the corner of Sunset Avenue it was stopped where I showed you a white pole. That Sunset Avenue, you remember, comes into North Elm Street up there, and Sacco and Vanzetti got aboard the car. The conductor particularly noticed them because he recognized them as two men who had boarded the car at the same place at approximately the same time on either the evening of April 14 or the evening of April 15 previously.

"They rode in the car that night of May 5th to Brockton and were apprehended and arrested when they reached Campello, by Brockton police officers. They were searched, and on Sacco was found a Colt automatic pistol, which was found tucked down, as I recall, inside his trousers. It was fully loaded. If I might say it was a 10-shot pistol, 32 calibre. There were 22 loaded cartridges in his hip or pants' pocket. Vanzetti had on him a

loaded 38 Harrington & Richardson revolver. There were no extra cartridges for the revolver found on Vanzetti. They were taken to the Brockton Police Station and booked.

"On the next day, which is May 6, or two days afterwards, I think it was the next day, various witnesses from South Braintree, were brought to the Brockton Police Station, and several identified Sacco as the man who had participated in the shooting and was in the abandoned car after the shooting. Vanzetti was also identified at that time. Vanzetti and Sacco had known each other for some period before this. During the few days immediately preceding the joint arrest, Vanzetti had been at Sacco's house in West Stoughton, and their stated reasons, stated to a police officer, for going to West Bridgewater that night, was to go down and see a man named Peppy or Poppy whom Vanzetti thought lived in West Bridgewater, and that they lost their day down there and did not find Peppy and did not know where they were. Orcciani was seen with his motor-cycle and side car—the number, I believe, was 861—at Sacco's house and in the yard of [75] the 3-K shoe factory with Sacco on either the day of the arrest and the day when Orcciani was seen down in West Bridgewater, or on the previous day.

"The contention of the Government, gentlemen, is that this crime was committed by five men; that use was made of this stolen Buick car, which for some time, at least, previous to the crime and after its theft from Dr. Murphy of Natick, had been kept in the curtained shed at the Coacci house in West Bridgewater; that on the morning of the murder or at some time previously before that it was taken from the Coacci house and was driven to South Braintree; that they picked up Vanzetti at the East Braintree station; that the men who guided and drove that car were very familiar with the localities of West Bridgewater and the roads leading to and from that section; that they went down to the railroad crossing after turning from Pearl Street, after the shooting, and made that hairpin turn to throw their pursuers off the scent; that they then proceeded in the most direct way possible to a point which they designed to reach west of Brockton, because if they went south from South Braintree they would have to go through large places like Brockton; that they proceeded by those back roads, Oak Street and Chestnut Street, until they got to the old turnpike, which, though a rough road, furnishes a direct means of access to the West Bridgewater locality; and that they tore down there at this high rate of speed and then either started to take Vanzetti over to Plymouth and for that reason went over the Matfield crossing or went over there with the idea of perhaps disposing of something in the Matfield River—which is the first water they come to down in that location—or for some other reason that we do not know, went over there and found it was inadvisable to do that which they intended to do or accomplish their purpose, whatever it may have been, came back over the Matfield crossing and subsequently abandoned their car in the region adjacent to the Coacci house.

"I have mentioned about a cap being found at the scene of the shooting near the body of Berardelli. Sacco was in the habit of wearing a cap, and witnesses ¹ who know the kind of cap and the cap that Sacco was in the habit of wearing will tell you that the cap found at the scene of the shooting is similar to the cap that Sacco wore.

"There were six bullets found in these two men, two in Parmenter and

¹ Geo. Kelley.

four in Berardelli. The two in Parmenter were fired from a Savage automatic pistol. It is perfectly easy to tell from what type of gun a cartridge is fired by reason of the marks left on the bullet by the rifling of the gun or pistol. They have certain ridges in the pistol which makes depressions in the bullet, and the distances between those depressions or ridges give you a clue as to the kind of gun or to the weapon from which the bullets came. And the bullets in Parmenter's body came from a Savage automatic, three of the bullets, and of 32-calibre.

"Three of the bullets in Berardelli's body came from a Savage automatic of 32-calibre, but the bullet, gentlemen, that caused Berardelli's [76] death, the bullet that was fired as he was crouched on the ground or prostrate on the ground, that entered in behind his shoulder and went down through his body and lodged in his intestines, or lower abdomen, was fired from a 32-Colt automatic pistol. And when Sacco was arrested three weeks afterwards he had on his person, tucked down inside his trousers, a fully-loaded Colt automatic pistol of 32-calibre, and he had twenty-two additional bullets for that pistol in his pants' pocket.

"Gentlemen, I think I have covered the main facts which the Government will present to you through the witnesses which it will call. As his Honor stated to you the other day, what I have stated to you is not evidence. It is simply stated to you by me, with the utmost good faith, as what we intend to show to you and what we expect to show to you. No man can guarantee what the testimony of witnesses will be. The story in the rough is as I have told you. There will be details which I have not told you, which perhaps escape my memory at the present time. You will listen to the evidence carefully and you will size up each witness, size them up sometimes by instinct and sometimes by analysis. You can say, 'What opportunity did that witness have to observe? What opportunity'—opportunity is not the word—'What are the chances of his or her remembering accurately what he or she has observed? Does he or she tell his or her story on the stand as if it was a true story?'

"You have got to remember—and I say this because this is your first case, and you have not been sitting through a long, criminal term—that the stand, and particularly the stand in an important trial, is a difficult place to put any witness. Any one of you, if you had to go, in a murder case particularly, on that stand and were subjected to cross-examination before a jury and before a judge and before a court room of spectators, would not tell your story the way you would tell it to your wife at home. You would be bound to be embarrassed. You would be oppressed by the responsibility that is put upon you, and, gentlemen, when you listen to the witnesses on both sides, in this case you will bear in mind the difficulties under which the witnesses are laboring and the situation in which they are first put. But you will size up their opportunities of observation and what they apparently have remembered, how they tell it, and from that and from your own instinct you will say whether or not they are telling, or attempting to tell, the truth.

"The law in this case is not as complicated as it is in some murder cases. It is apparently a case of first-degree murder or nothing. First-degree murder is a killing perpetrated with deliberately premeditated malice aforethought, that is, with an unlawful motive or purpose which has been premeditated, which has been thought out beforehand, deliberately thought out. Now, in

this case you have got a group of men, according to the claim of the Commonwealth, conspiring to rob two men who were entrusted with a large sum of money, armed with dangerous weapons, with [77] the apparent intent if resisted, or perhaps, if not resisted, to shoot to kill or maim.

"Now, with that state of facts, with the resulting shooting and killing connected with this unlawful robbery, you cannot have anything but first-degree murder if you find that the shooting was completed by the killing.

"You have got two defendants. The Commonwealth has no evidence of any eye witness that saw Vanzetti fire any gun. They have direct evidence of Sacco shooting at Berardelli, but their evidence connecting Vanzetti with this murder connects him with the gang that perpetrated the murder and puts him in the car, puts him there, and you may fairly ask me if he did not shoot anybody, is he guilty of murder?

"The law is this, gentlemen. If two or more conspire to kill and do any joint act looking towards the killing and do kill, one is as guilty as the other. If they in concert aid and assist each other in killing a man, they are both guilty of the killing. You, sir, may hold a man while I shoot him, and you are as guilty as I am. The man who drove the car up to assist them and was there helping them, bringing them to the scene and taking them away, is just as guilty as the man who fired the shot. Every one of this group who participated in this hold-up, in this shooting, if they knew that shooting was intended, if there was resistance to the robbery, or if there was not resistance, are guilty of murder as much as if they had actually held the gun.

"Now, gentlemen, the medical evidence will be called first to give you an idea as to how these men met their death. We will follow it up with the description of the shooting and go down the line as I have now brought it to you. Very likely it will be a long trial. There are a good many witnesses to be heard. We will try to make it as short and concise and as to the point as possible. I ask for your patience in the matter because it is too serious a case to go over lightly. Watch the witnesses carefully and bear in mind as far as you can the general scheme which I have laid out to you, for it embodies the claim of the Commonwealth, and try to forget as far as you can when you are listening to the evidence that this is anything more than any other case because you have got to size up evidence in the same way in a murder case as you have in a case of petty larceny. The same principles are involved in listening to your witnesses and in gauging your evidence, and try to forget, and I do not want you to minimize the seriousness of the case. That is not what I am saying, but simply in listening to the evidence as you go in from day to day, try as far as you can to forget any result that may be reached but get out of each witness what you can and find out from each witness what the real truth is, and when you get to the end of the case by putting together what you have acquired together you will come pretty near determining what is right.

[Mr. Williams is called to the bench by the Court.]

THE COURT. Also the degree of proof required, and also that the defendants are entitled, as a matter of law, to the presumption of innocence [78] until the Commonwealth has established beyond reasonable doubt that the defendants are guilty.

MR. WILLIAMS. His Honor very properly reminds me that I have failed to state to you the position of the defendants at the bar at the present

time, an oversight on my part. You must not take into consideration, gentlemen, the fact that either defendant is under arrest. The fact that they have been indicted by a Grand Jury, that has nothing to do with the case. The Grand Jury is simply the grand inquiry body of this County, which investigates one side of a case, and on such investigation where the defendants are not present, where they are not represented by counsel, returns a complaint, on which complaint the defendants are arrested and held in custody.

"The defendants are presumed to be innocent. They are just as innocent at the present time as you or I may be. They do not become guilty until evidence is offered before you gentlemen to overcome that presumption of innocence, and such evidence as you will find does overcome that presumption. The evidence must be so strong as to maintain that burden of proof which is upon the Government in a case of this kind. It is not mere preponderance of the evidence in a criminal case. It is what we call proof beyond reasonable doubt, and you must find, before you say that these men are guilty and not innocent, that they have been proved guilty beyond a reasonable doubt. Now, what is a reasonable doubt? You have heard the phrase used time and again while his Honor was interrogating witnesses last week. You must remember that you gentlemen are not here to try to find a doubt. You are here to find the truth, but if, in searching for the truth, you do have a reasonable doubt, it is your duty to say so. It has sometimes been said that a reasonable doubt is that doubt which a man would have in determining the most important matters of his own life and existence. His Honor has said in a recent charge that a reasonable doubt is the doubt of a reasonable man searching for the truth.

"I presume, Mr. Foreman and Gentlemen, that there is no such thing in any case tried in court as an absolute certainty. What we are trying to find is what are called moral certainties. We are here to try to find the truth, and if in searching for it we run up against something which gives us a reasonable doubt, it is our duty to say so, but we are not here, gentlemen, to try to find those doubts. If you find to a moral certainty beyond any reasonable doubt, if you as reasonable men in your varied experiences believe that these defendants are guilty, it is your duty to say so. That is, gentlemen, the law that applies to all criminal cases. It is no different in a murder trial than it is in any other. You simply may look at it in a more serious light and will undoubtedly because of the seriousness of the case, but if you find after evidence, sufficient evidence has been submitted to overcome the presumption of innocence which now rests upon them that they have been proved guilty beyond a reasonable doubt, it is your duty, of course, to so declare." [79]

It will be noted that nothing was said by Mr. Williams about consciousness of guilt; and that no claim was made that the defendants had tried to use their guns when arrested—both points relied on by the prosecution later in the trial.

Judge Thayer gave instructions that no witness should remain in the court room while any other witness was testifying, but excepted from this order experts and police officers who had assisted in preparing the case.

The physicians who had officiated at the autopsies on the bodies of the

murdered men described the wounds which they had found, and identified the bullets which had been taken from the bodies.¹

On June 8th SHELLEY A. NEAL, agent of the American Railway Express Company, told how he had, on April 15th, 1920, received at the railroad station a package of money, part of which was the payroll of Slater & Morrill. He testified that on his return from the station he had observed a newly varnished Buick car standing near the tracks and beside it a tall, slim man with light hair who seemed to be suffering from tuberculosis. He said that after the shooting, as a car was passing over the railroad crossing, he noticed the back of it and immediately recognized it as the car he had seen in the morning. He identified as this automobile the one which had been found in the Manley woods, a seven-passenger Buick.

Both Mr. Moore and Mr. McAnarney cross-examined Neal at great length about his identification of the car, and as was noted at the time, the witness became confused under their cross-examination. Counsel were undoubtedly afraid that the identification of this car which had already, at the Plymouth trial of Vanzetti, been tied up with the Bridgewater crime, would, in the minds of the jurors, connect the defendants with both crimes. Of course the jurors were supposed to know nothing of the earlier conviction. But that supposition was probably not in accordance with the facts, since the newspapers had almost from the beginning connected the two crimes and since the places of trial were so close together. On the opening day of the Braintree trial many of the local newspapers commented upon Vanzetti's having been brought to court under guard from the prison where he was being confined for another offense. One paper even stated the exact length of his earlier sentence. A reading of the record leaves the impression that counsel for the defendants made their fear about the tie-up with the car too manifest to the jury. They tended to jeopardize their defense on an issue they should have realized would go overwhelmingly against them.

On June 9th began the testimony of eyewitnesses to the shooting.² CARRIGAN, BOSTOCK and WADE were all unable to identify any of the bandits, although their opportunities for observation had been good. Wade, admitted he had once thought Sacco resembled the man who shot Berardelli, but he said he had changed his mind when he later saw another man who also resembled the bandit.

MISS SPLAINE, a bookkeeper for Slater & Morrill, was the first witness who positively identified Sacco. She was sure he was the man she had seen for an instant from a window in the factory building as he was leaning outside the automobile when it crossed the railroad tracks. She gave a detailed description of this man, noting particularly that his left hand "was a good sized hand, a hand that denoted strength."

On cross-examination she was asked a number of questions about her testimony at the preliminary hearing which had taken place at Quincy a few weeks after the arrest. She denied having then testified that the man

¹ See pp. 335, 336.

² See pp. 205-315, 337-342; plan facing p. 342.

had been firing a gun, but the record of her examination showed that she had said so. She also denied that she had expressed doubt about her identification. Her statements at Quincy had been: "I will not swear positively that he is the man," and: "I don't think my opportunity afforded me the right to say he is the man." The context shows that by opportunity she meant her opportunity for observation on the day of the shooting. She further testified that after the shooting she had picked out a picture as being that of the man she had seen and had later been told that the subject of the picture was in jail at the time of the crime.

On redirect examination Miss Splaine said she had identified Sacco at the police station before any one had told her he was the defendant in custody. She admitted the correctness of the Quincy record and explained the present certainty of her identification of Sacco by saying she had had additional opportunity for observing him in the court room at Quincy. Nevertheless, on recross examination she said she had not seen him since giving her testimony there. It appeared she had observed him first on the day of the shooting, during the time it took the car to travel thirty or thirty-five feet; then several times at the police station; and finally during the entire time of her appearance as a witness at Quincy. Since giving her testimony there she had had no further opportunity of seeing him.

A number of other witnesses who were unable to identify testified on the next day, as did also PELSER, the second to identify Sacco, who said the defendant was the "dead image" of the man. He claimed to have seen the bandit through a partially opened window in one of the factories but admitted that he had told both the police and an investigator for the defense that he had seen no one and also that he had run away because he was scared. It appeared he had recently been reemployed by Rice & Hutchins, was now working for them, and had talked with his boss about the case before going on the stand.

Following this testimony there came, on Saturday, June 11th, Mrs. LOLA ANDREWS who said she had spoken to a man working underneath a car parked in front of the shoe-factory just before noon on the day of the shooting. In February, 1921, she identified Sacco as this man. When she picked him out at the trial Sacco rose to his feet in the cage in the court room and said, "I am? Take a good look. I am myself?" As he made this dramatic interruption he stood expectant, a smile on his face, for one tense second while all eyes focused in his direction. Mrs. Andrews, like Pelser, had been interviewed by the defense before the trial and had at the time been shown photographs of Sacco. In the statement then taken she had said these pictures did not resemble the bandit. At the trial she denied some of the statements attributed to her and refused to admit that she had been shown some of the pictures produced. The record of her cross-examination on this subject is, however, very confused because the pictures were not clearly numbered.

Mrs. Andrews collapsed on the afternoon of Monday, June 12th, just after having admitted that one of the pictures shown her in court had been

shown her before. Whether her breakdown was due to the pressure of the cross-examination, or, as the District Attorney later claimed, to the appearance in court of an Italian whom Mrs. Andrews associated with an attack made upon her some months earlier, cannot be determined. There is testimony that she herself attributed her collapse to alleged cross-examination about her past life. Yet there had been practically no such cross-examination.

Vanzetti was first brought into the case by the gate-keeper at the railroad crossing, MICHAEL LEVANGIE. He placed Vanzetti in the bandit car, as the driver. Another witness, FAULKNER, claimed to have seen him in a train going to East Braintree on the morning of the shooting, nervously inquiring at each station about his destination. Faulkner described the car in which he had then been riding as a combination baggage car and smoking car. It was in fact a full-length smoking car, with no compartment whatever for baggage.

On Tuesday, June 14th, after brief further cross-examination of Mrs. Andrews, testimony corroborative of Miss Splaine was given by MISS DEVLIN. A cobbler, DEBERADINIS, who had been close to the car as it sped away after passing over the crossing, was positive that the man leaning outside was not Sacco. He asserted this man had been light-haired. Then DOLBEARE, the one time talesman, took the stand and told how he had recognized Vanzetti when he saw him in court as one of the men who had sat in the back of a car he had noticed on the streets of South Braintree on the morning of April 15th, 1920. Two more witnesses, HERON and TRACY, identified Sacco as one of two men they had seen in different parts of the town shortly before the shooting. All this time Sacco, according to contemporaneous accounts, smiled at his accusers.

The last identification testimony was given on June 15th. GOODRIDGE, a poolroom player, testified that he had seen Sacco shooting out of the automobile as it passed along the street. An attempt was made to impeach him by showing he had pleaded guilty to a charge of larceny in the Dedham Court and had been placed on probation, in October of 1920, the suggested inference being that a connection existed between the leniency accorded him and the testimony given. Judge Thayer refused to permit the facts to be brought to the attention of the jury on the ground that no actual judgment of conviction against Goodridge had ever been entered on the record.¹ This became one of the points on the appeal.²

The next witness, REED, a crossing-tender, said he had seen Vanzetti in the car while it was being held up by a train at the Matfield crossing between Brockton and Bridgewater, and reported that the defendant had cursed him in clear and unmistakable English because he had not allowed the car to cross ahead of the train. It was argued by the defense that this man could not have been Vanzetti since Vanzetti spoke English brokenly and with an accent.

¹ See pp. 266-268.

² See pp. 123, 267.

Sacco had thus been identified by seven witnesses; Vanzetti by four. The details of all the testimony of the eyewitnesses are discussed in a later chapter. [Part II, Chapter I.]

Testimony was also given by a number of people who had observed the car on its way from South Braintree to Brockton. None of these witnesses was able to make an identification.

On June 16th testimony was given of the finding on April 17th, 1920, of a seven-passenger Buick touring car in the Manley woods not far from West Bridgewater. This was the car identified by many witnesses at both trials as the one used both at Bridgewater and at South Braintree. The car was shown the jury and in that way became an exhibit in the case. The defense placed much stress on the origin of a bullet hole in the car which had not been noticed by those who first examined it. There was also discussion about the admissibility as evidence of a coat found in the machine, discussion which prompted the following dialogue:

"THE COURT. Then I infer from that you are going to comment on the fact that the Commonwealth does not offer it, you intend to comment on that fact in argument, or you want it left open to you?

MR. MOORE. I am just simply standing on the right, the formal proof is not ample, no more ample here than it was on the car.

THE COURT. You let me determine that, please.

MR. MOORE. Well, I am simply standing on the question of the record, please.

THE COURT. I will ask you this question: Do you want it left open to you whether you have a right to comment because the Commonwealth has not offered this coat in evidence or by way of concealing evidence?

MR. MOORE. The attitude of the defense, your Honor, is simply we stand on the fact that there is no proof.

THE COURT. Will you answer my question? That is all I am dealing with now, whether you want that question left open. [657]

MR. MOORE. Standing on the proposition that there is no sufficient proof to warrant that evidence.

THE COURT. That is not answering my question. Do you intend to have it left open so you could argue the fact that the Commonwealth has failed, that if the Commonwealth does not offer it that it is concealing evidence or that there was no coat found in the automobile?

MR. MOORE. It would be,—I have no intention of arguing that the Government has concealed that coat when it is brought in here, certainly. I would not be guilty of an absurdity, but on the other hand I am not willing to agree as to any legitimate and proper argument made in connection with that coat.

THE COURT. Are you going to claim if the coat is not introduced that there was no coat found in the car for the purposes of impeaching the credibility of the witness who said he found it?

MR. MOORE. No, I do not think that would be a proper argument to make, your Honor.

THE COURT. You wouldn't? I will exclude it, then." [658]

The theft both of this car and of the number plates which had been noticed on the bandit car was established. Both had taken place in Needham, the one in November, 1919, and the other in January, 1920.

Next came the testimony of Mrs. JOHNSON. It dealt with the acts of the defendants at her house on the night of the arrest and constituted the first step in the building up of that structure of consciousness of guilt which resulted in the introduction into the case of the radical views of the defendants.¹ Mrs. Johnson was cross-examined about her identification of Sacco. This cross-examination, like the insistence about the identity of the car, looks now like a serious error of judgment on the part of counsel, since Sacco had to admit he had been present when Mrs. Johnson said he was. It made it possible for Mr. Katzmänn in summation to charge that the defendants had not told the truth to their own lawyers. MR. JOHNSON, testifying on the next day, in the main corroborated his wife. He told also of his conversation with Boda and of the latter's acquiescence in his judgment that it would be better not to take out the car because it had no current number plates.

Mr. Katzmänn now attempted to bring before the jury testimony about Boda which had been used at the Plymouth trial.² The farmer, ENSHER, was, however, permitted to state only the barest facts about his acquaintance with Boda. After objection by defendants' counsel the jury was excused while Mr. Williams made the following offer of proof:

"We shall offer to show that this man Boda lived at the corner house there which your Honor recalls we took the jury to see, the so-called Coacci house; that he came there in the early part of December, 1919, and stayed there until about April 20, 1920; that while there he was seen driving a large Buick car of the type which is of interest to us in this case; that he was associated with one Orciani, that he was associated with Sacco, and we shall ask the jury from the evidence which we present to draw the inference that the car which Boda was then driving was the car concerned in this murder, and we shall tie up the car and Boda, by evidence of other association between these four men, Sacco, Vanzetti, Orciani, and Boda." [725]

Much discussion followed this offer:

"THE COURT. What evidence have you to show, in any way, to connect either Orciani or Boda, with either of the defendants?

MR. WILLIAMS. We have other evidence regarding that, which will be introduced later.

THE COURT. Well, what is it?

MR. WILLIAMS. We shall show them together at Stoughton.

THE COURT. Now, who were together?

MR. WILLIAMS. Orciani, Boda,—let me say we shall show Orciani, Sacco and Vanzetti together at Stoughton on May 4, I think the date is.

THE COURT. With what car?

MR. WILLIAMS. What?

¹ This subject is discussed in Part II, Chapter V, pp. 406-473.

² See Appendix to Part I, pp. 189, 190.

THE COURT. With a car?

MR. WILLIAMS. With a motor cycle at that time. We cannot place the four men together at any time in this particular Buick car.

THE COURT. Or one of this type?

MR. WILLIAMS. Or one of this type. We can show Boda had a car of that type, was seen driving it; can show the association between the men I have indicated. We will further show that this car was stolen on November 23, 1919, was seen driving through Dedham in the direction which has been indicated in court to your Honor; that Orciani was then living in Hyde Park, that Boda was then, if I am correct, living with Orciani, that he subsequently moved to the Coacci house about the first of December; that thereafter—

THE COURT. Are you going to show that the number to which the Dedham policeman testified was the number on any car that Orciani had?

MR. WILLIAMS. No, we cannot show that. We will further show that after Boda moved to the Coacci house, curtains were on the windows of this shed. That is, the windows were curtained off, and that there were marks of another car kept in the shed.

THE COURT. Have you any evidence tending to prove that either Boda or Orciani or Coacci had any relationship as to any issue involved in these indictments?

MR. WILLIAMS. We cannot place them in South Braintree, if that is what your Honor means.

THE COURT. I am very much in doubt.

MR. WILLIAMS. I also call to your Honor's attention the place where the car was found in the woods, and the Coacci house where Boda lived, the relation between that place and Elm Square and the Johnson house.

THE COURT. How far was it?

MR. WILLIAMS. About three-quarters of a mile from the Coacci house to Elm Square. The Johnson house, if you remember, a few hundred yards beyond there. It was a little over a mile and a half from the [726] Coacci house to the place in the woods off Manley Street, where the car was found.

THE COURT. The difficulty with me is to find some relationship between this car Boda had and the car used at the day or time of the alleged shooting. There is the great difficulty, Mr. Williams. I am very much in doubt about its competency. Beyond the fact that it was a touring car of a Buick model, is there—

MR. WILLIAMS. No, not as to the car Boda was seen driving.

THE COURT. What is there that you claim shows any logical connection between the car Boda was driving and the alleged shooting, anything more than Boda was driving a Buick car?

MR. WILLIAMS. We show this: let me start with the car. Supposing there is nothing about the South Braintree murder in evidence at the present time. We start with a man named Boda driving a large car in that general direction and keeping it, as we will offer evidence which we say tends to show, in a shed under conditions which show that he was intending

to conceal the keeping of it. We show that Boda was associating with a man named Orciani and a man named Sacco. We show that Vanzetti was associating with Sacco and with Orciani. We show that those men were associating together under certain circumstances in that general vicinity on May 5, three weeks after the shooting. We show that Sacco and Vanzetti—we will show that Sacco and Vanzetti were down in that vicinity on the night of April 14, the night before the shooting, or the night of April 15, the night of the shooting; and we shall ask the inference that it was that car used by those associated gentlemen which was concerned in the murder and we shall endeavor to show that Sacco and Vanzetti—

THE COURT. Is there any claim that there was any concert of action between Orciani and Boda and the defendant?

MR. WILLIAMS. Only that by reason of the association of Sacco and Vanzetti with these men, particularly Boda, who had such a car, we shall ask the jury to draw the inference that that was the car which was concerned in the South Braintree shooting.

THE COURT. Inference based on what?

MR. WILLIAMS. On the association of the men and linking up those men with this car which Boda was driving.

THE COURT. How much evidence have you as to the association?

MR. WILLIAMS. We have two or three instances of their being seen together at Stoughton.

THE COURT. Have they ever been at his house—have you any evidence that they have ever been at his house or barn where this automobile was kept?

MR. WILLIAMS. We have evidence of one or more occasions where on a Sunday night or Sunday nights where a car with four dark men was [727] seen to drive up to that Coacci house. We cannot show they were the particular men you have spoken of.

THE COURT. That is not enough to identify either of these defendants. There are a good many Italians who are dark men.

MR. WILLIAMS. Mr. Katzmann suggests I have not indicated the nature of the testimony as to when Boda was seen driving this Buick car, which was shortly before the South Braintree shooting.

THE COURT. But he is not connected in any way with the murder. Anybody else driving a Buick car, if it was a 7-passenger car, would stand almost in the same relationship.

MR. WILLIAMS. He would, if it were not for the geographical significance of the locality.

THE COURT. But there is not one identifying feature. For instance, a window out in the rear, or any other thing.

MR. WILLIAMS. That was taken out. Our evidence shows that was taken out the day of the shooting. It may be remote, if your Honor please, but it has seemed to us—

THE COURT. I am afraid of it. The only question that disturbed me at all. I am not going to admit that at the present time. I want to consider it. That

is a very disturbing question. Nothing hitherto has been troublesome at all, not in the least.

MR. WILLIAMS. Then, if your Honor please, I will suspend with this witness and put on another witness." [728]

Here ended the attempt to connect Boda or Coacci with the crime. No evidence was offered about the curtains in the Coacci shed, the hole in the floor or the tire marks which Mr. Williams had discussed in his opening. The jury, at the very end of the case, was instructed to disregard the viewing of the Coacci shed. The reference to these matters in Mr. Williams's opening, coupled with the view, may, however, have left an impression on the minds of the jurors unfavorable to the defendants.

The conductor, COLE, repeated substantially the testimony he had given at Plymouth that he had seen both defendants riding on his car on April 14th or 15th, 1920. CONNOLLY,¹ the police officer, on the other hand, gave very different testimony from that at Plymouth. There he had said nothing about attempts on the part of Sacco or Vanzetti to use their guns at the time of arrest or later in the automobile on the way to the police station. Yet at this trial he testified to such acts having taken place on both occasions. When he stated that Vanzetti at the time of his arrest had put his hand in his pocket there came a dramatic interruption to the proceedings, as Vanzetti fairly shouted: "Liar." No attention was called by defendants' counsel to the fact that Connolly had given no testimony whatever such as this at the earlier trial. It should be pointed out, however, that at the Plymouth trial Judge Thayer had at first not permitted testimony by Connolly about Vanzetti's possession of a revolver at the time of his arrest and that when he finally let the evidence in the police officer was not actually called back to the stand to give further testimony.² Connolly was followed, at the Braintree trial, and in some small degree confirmed, by Officer SPEAR. Spear did not, however, testify to any suspicious acts on the part of either defendant.

After this testimony LORING identified a cap he said he had found after the shooting near the body of Berardelli. It was claimed by the prosecution that this was Sacco's cap.³ An attempt to introduce the cap in evidence at this time was blocked by objection on the part of defendants' counsel, and it was marked for identification only. The defense took the position that the cap had been dropped after the shooting by one of the hundreds who had milled around in the street.

Partly to show that this cap had not belonged to either of the murdered men, their two widows testified concerning it on June 20th. MRS. BERARDELLI was also questioned about her husband's gun, which, she said, had had a broken spring and had been taken to the Iver Johnson Company for repairs a couple of months before the shooting. Shown the gun found on Vanzetti, she said it was like the one her husband had been carrying.

¹ See pp. 413, 414.

² See pp. 190, 195.

³ See pp. 379-389.

Three employees of the Iver Johnson Company testified concerning the gun left by Berardelli.¹ One of them, WADSWORTH, said Vanzetti's gun was of the same kind as Berardelli's; another, FITZMEYER, that he had put a new hammer into the Berardelli gun; the third, JONES, that this gun was no longer in the shop and yet had not been sold with unclaimed merchandise. Practically no effort was made to cross-examine these witnesses although Fitzmeyer testified that Vanzetti's revolver showed signs of having been recently fitted with a new hammer.

Photographs of Sacco and Vanzetti had been taken after their arrest. Objection was made to submission of these to the jury on the ground that defendants could not be compelled to furnish evidence against themselves. The Court, in the absence of the jury, heard the testimony of the police officer who had arranged to have the pictures taken and, for the time being, reserved decision on their admissibility.

The statements taken by Chief Stewart from the defendants after their arrest were read to the jury in part. The portions omitted which related to the defendants' opinions were, after both defendants had testified on their own behalf, presented in rebuttal.

That Sacco had not been working on the day of the crime, but had asked for a day off for the purpose of visiting the consul's office to get his passport, was established by GEORGE KELLEY. This witness was superintendent at the factory in Stoughton at which Sacco had worked. On being shown the cap which had been found at the scene of the crime, he said it was similar in color only to one he had seen Sacco wear. Pressed then by Judge Thayer, he finally stated that the two caps were alike in general appearance. As a result of this testimony the cap was admitted in evidence. (The testimony is quoted in full at pp. 381-384, where the subject of the cap is dealt with in detail.)

On cross-examination Kelley said Sacco had been a steady workman. It also appeared he knew Sacco carried a gun. For a time the defendant had been employed to watch the fires in the factory at night, but the attempt by the defense to show that the pistol had been carried in consequence of these duties resulted in failure.

On June 21st JOHNSON was recalled to report more fully his conversation with Boda. He said the latter had seemed ready to take the car out in spite of its having no current license plates until he noticed Mrs. Johnson returning from the neighbor's house and added that it was possible to notice the telephone wires along the street. When originally questioned about the talk with Boda, Johnson had testified that the latter had acquiesced in his advice not to take the car out on account of its lack of plates and he had suggested no other reason, suspicious or otherwise, for Boda's having finally left the car.

Shells found at the scene of the crime were identified by FRAHER who had found them, and by whose name they were subsequently designated. The

¹ See pp. 397, 398.

two prosecution experts, PROCTOR and VAN AMBURGH, testified about these shells, about the mortal bullets and about Sacco's gun.¹ On the previous Saturday they, together with the experts who represented the defendants, had, at the suggestion of the defense, conducted at Lowell, Mass., certain tests with Sacco's pistol. The tests consisted chiefly of firing through Sacco's pistol a number of bullets of different makes. The bullets fired by each side were recovered and microscopically examined by the experts retained by that side, preparatory to their testifying. Earlier in the case Mr. Katzmänn had assured Mr. Moore that he would not claim that any one of the bullets found in the bodies of the murdered men had been fired by any particular pistol, but after the Lowell tests he withdrew this assurance.

At the trial Proctor testified that one of the bullets, the one which had caused the death of Berardelli and which was called bullet No. 3, was "consistent" with having been fired through Sacco's pistol. Van Amburgh said he "was inclined to believe" it had been fired through that gun. Proctor's use of the word "consistent" in this and other answers was, after the trial, challenged as an attempt to mislead the Court and jury on the ground that Proctor had not intended to state a positive opinion but only to appear to do so. This aspect of the case is dealt with in detail in Part II, Chapter II of the present volume. That the attempt to deceive, if such it was, apparently succeeded, may be noted from the account in the *Herald* of the 22nd, where it is stated "experts pick murder pistol"; "in their opinion the bullet was fired from the automatic pistol carried by Sacco."

So ended the case for the prosecution. There was no motion by the defense seeking a dismissal.

The case for the prosecution rested upon a number of items of evidence, some direct, others circumstantial. The first five chapters of the second part of this book are devoted to a detailed consideration of these claims and the answering contentions of the defense. Briefly stated the claims were:

1. That seven eyewitnesses identified Sacco as present at or near the scene of the shooting; one of these picking him out as one of the bandits who had taken part in the murders. Vanzetti was not so closely connected with the crimes by any of the eyewitnesses, two witnesses placing him near the scene before the shooting and two others in the murder car after it.
2. That one of the bullets found in the body of Berardelli had been fired through Sacco's pistol.
3. That a cap found near the scene of the crime was Sacco's and that it had been identified as such by his former employer.
4. That the revolver found upon arrest on Vanzetti had been taken by Sacco from Berardelli and given by him to Vanzetti. Evidence was introduced to show that Berardelli had had a gun of the same kind and caliber as Vanzetti's, that shortly before the shooting the hammer in that gun had been repaired and that Vanzetti's showed marks of similar repairs.
5. That acts of the defendants just before and just after their arrest showed them to be conscious of wrongdoing, and that falsehoods told by them in explanation of their conduct supported this contention.

¹ See pp. 342, 343, 357-360.

c. The Defense

The various claims of the prosecution were met with denials by the defense. They produced witnesses to testify that neither of the defendants was present at or near the scene of the crime. Experts disputed the contentions of the prosecution concerning the mortal bullet. The similarities between the caps and the revolvers were contested and the history of the gun found on Vanzetti was traced through prior ownership. To explain the charges of suspicious conduct the defendants both took the stand and disclosed their radical beliefs, claiming that they had been in fear of deportation and possible injury because of these beliefs and that if any consciousness of guilt could be inferred from their acts it was to be ascribed to radical, and not to criminal, activities.

Finally, both defendants claimed alibis, which are discussed in the sixth chapter of Part II. Sacco claimed that he was in Boston seeking information about his passport to Italy; Vanzetti that he was peddling fish in Plymouth.

On Wednesday, June 22nd, the nineteenth day of the trial, Mr. Callahan made his opening address to the jury on behalf of Sacco. It was preceded by a few remarks on the part of Judge Thayer and followed by Mr. McAnarney's suggestion that a separate opening for Vanzetti was not necessary.

"THE COURT. (To the jury) Mr. Foreman and gentlemen, it is my duty to make the same suggestions to you immediately preceding the opening by counsel for the defendants that I did preceding the opening by Mr. Williams, counsel for the Commonwealth. As I said to you then, and I repeat now, these are simply opening statements, sometimes called the opening arguments, but they are statements to give you an intelligent idea of the evidence that the defendants propose to introduce for your consideration, and that being true, you must bear in mind, as I said then, that statements by counsel in any opening should never be considered evidence. It is not evidence. It is simply statements of what counsel propose to prove, and that being true, you must wait until you get the evidence that will be introduced by the counsel for the defendant; and I told you a few days ago that you must keep your minds open.

"The Commonwealth has now rested. You must keep your minds in a state of absolute impartiality. You have not heard the testimony of the defendants and, therefore, you should still keep your minds open and in a state of absolute impartiality, with a view of deciding these cases after you have heard all the evidence, and after you have heard the arguments, and after you have heard the charge, and then you will return to your jury room and, as I said, I hope your minds then will be in as near a perfect state of impartiality as the general lot of humanity will permit, with a view of determining from all the evidence introduced on both sides as to what is the truth.

"You may proceed with the opening, please.

"MR. CALLAHAN. May it please the Court, Mr. Foreman and gentlemen: You have now heard the Commonwealth's direct case. That is to say, you have now substantially all the evidence on which they base their proof of the allegations stated in the indictments upon which these men at bar are charged with. To use the vernacular of the street, I presume you are 'all sick' of your job. But, Mr. Foreman and gentlemen, you are now passing through or in the performance of a very, very important duty, one which is of a most solemn nature, one which deals with the very existence of human beings, and I urge you in the consideration of the evidence, both on behalf of the Commonwealth and on behalf of the defendants, and in your determination of that evidence, I urge you to use every sense of duty in your very existence.

"I want you to pause for a moment and consider what is before you. The lives of two human beings, and when you deal with the evidence that has been offered here by the Commonwealth and when you deal with the [941] evidence that is to be offered here by the defendants and their witnesses, you are dealing with the lives and the existence of the two defendants.

"You have had an experience to date, day after day, week after week, sitting here in the jury box listening to the various witnesses, their testimony, the various arguments between counsel and some with the Court, and you have heard the Court make various rulings as to the admissibility of certain evidence, and you have heard after those rulings were made by him, exceptions taken by the defendants' counsel, and you will hear, perhaps, in the introduction of the defendants' testimony those things happen, and I am going to ask you and say to you that those exceptions are of no consequence to you.

"The fact that exceptions were taken by defendants' counsel are as a matter of right, and they have a right to go to a higher court to ask for another adjudication. And so I say to you they are of no consequence to you in any form whatever.

"At the conclusion of the trial and as a part of the judge's charge, he will undoubtedly instruct you as to various principles of law laid down in this Commonwealth governing the evidence that has been admitted here and testified to by the witnesses. Those principles of law which he lays down to you are the principles of law upon which you are to base your conclusion of fact when you reach the jury room, and I say that to you now to distinguish between the fact that exceptions have been taken,—to repeat that they are of no consequence to you, but the law that you are to take is the law that will be laid down later by his Honor in his charge to you.

"We start at the opening of the defendants' case in the same legal predicament as when the Commonwealth opened their case, that is, the defendants now are innocent of this crime, and they remain so until you have determined the evidence and changed their legal category from that of innocence.

"The presumption of law still is that they are innocent of the crimes stated in these indictments, and the burden of proof is still upon the Gov-

ernment, or Commonwealth, to prove to you all the allegations set out in the indictments beyond reasonable doubt.

"As a matter of law, the defendants are not obliged to offer any testimony whatsoever, and the mere fact that they do offer themselves as witnesses or offer other witnesses to explain situations that developed in the Commonwealth's case, they do not sustain any burden. The Commonwealth still carries the burden that they must prove to you beyond a reasonable doubt the allegations set out in the indictments. But the defendants do intend to offer themselves as witnesses, and they do intend to call other witnesses who will explain certain situations that were brought out by the Commonwealth's witnesses.

"The defense will be made up of practically two parts. We shall offer witnesses that were at or near the scene of the shooting April 15th that will tell you what they saw and who they saw, and by that, when I say [942] 'who they saw,' I mean with reference to the defendants. The defendants will explain to you in person what they were doing on the day of April 15, substantially at the time, not only at the time when the crime was committed—or crimes were committed—but also throughout the entire day.

"The defendant Vanzetti will offer himself as a witness and tell you his experience from the time that he landed in this country, I think New York, and his life experience of the years he remained in New York City, working around restaurants, washing dishes and maintaining himself as best he could, until some few years ago he made his home in Plymouth, Plymouth County, down on the Cape, and for a few years he worked there in a mill, doing unskilled labor.

"After saving a few dollars he bought out a small fish business, a fish business that consisted of a push-cart only for several years, and sold fish around the streets in Plymouth with his push-cart. When the fish business was not good, he did outside labor, worked for independent contractors there, as an unskilled laborer, and that has been his life since he has been in this country up to the date of May 5th, when he was arrested.

"Now, as to Sacco, Sacco will also tell you that some few years ago,—1908, I think,—he landed in Boston, went to live first in Milford, Massachusetts, obtaining employment as a water boy with some contractor there who was doing paving work in the streets of Milford.

"Later, he got promoted to the occupation of carrying paving stones, and from there he worked during the summer and fall of his first year in this country, and when winter came he went into one of the machine shops and did unskilled labor. He worked there for nearly a year and then went to a school to learn edge-trimming, and I mean by "school" he went to what was known then in Milford as the 3-K Shoe Factory, which is now in Stoughton, and a Mr. Kelley—not the man who testified here a few days ago, but I think his father—taught him for a certain sum of money the trade of shoe trimming or edge-trimming.

"And from there he went to Webster and worked in the shoe factory there, in his trade of edge-trimming. Then he came back to Milford again and

worked in another factory, in his trade as edge-trimmer. Then he came down locally here to Stoughton. I think he worked in Rice & Hutchins in South Braintree for a short time as edge-trimmer. Then he worked in Cambridge for a short time edge-trimming. Then he worked in Somerville and then in Chelsea, until later he came to live in Stoughton and went to work again for the 3-K Shoe Factory and worked there for several years at his trade of edge-trimming, and worked there up to May 1st or 2nd of last year previous to his arrest.

"He will tell you of his home conditions, of his mother passing away some time in the early part of March of last year, and the receipt of a letter from his father asking him to come home on account of his mother's [943] death and on account of the illness of his father, and after the receipt of that letter he went to his employer at the 3-K Shoe Factory in Stoughton, showed the letter, or at least talked about the letter, and told his employer that he had decided to go back home, and then asked that arrangements might be made that he could go to Boston some day the latter part of the week of which April 15 fits in.

"And when Mr. Kelley took the stand I wish you to notice that he testified that Sacco had asked him, not only that week, but some week before, about getting away some day, but there wasn't any particular or definite day mentioned by Sacco, but some day during that week, on which he might go in to Boston and make application and obtain his passport, and that he was told by his employer that after he had caught up his work he could so do, and he went and obtained the services of another man who he "broke in" as they say in a factory, taught or instructed or demonstrated the work; that a man and he worked together for several days until the work was caught up, which happened to be Wednesday, April 14; and that night he called the condition of his work to Mr. Kelley's attention, and Mr. Kelley said: 'Very well, go tomorrow.'

"And he will tell you that he went in on the early train from Stoughton Centre, Massachusetts, to Boston. He will tell you about going to the office of the Italian Consul, having with him a picture, himself and his wife and child, as a requirement for the application of a passport. And he will tell you his experience there in the office of the Italian Consul, in that the picture was not in right form or the right size, and that he had to go out and obtain another one, and he went back again after he had left the employ of Mr. Kelley, namely, May 2nd, when the passport issued, three days before his arrest.

"We will offer you in corroboration of that fact a deposition that was taken in Italy from the man ¹ whom he saw in the Italian Consul's office on the date of April 15. We will show you that that man worked in the Consul's office up until some time in that fall of 1920, when, on account of his health, he went back to Italy, and in that deposition, which will be presented to you later, it will show of the visit of Sacco to his office and of the business transaction between him and Sacco, the time of day. Then we will show

¹ Andrower.

you by Sacco his time taken up in Stoughton on the 2nd, 3rd, 4th and 5th of May, up to the night of his arrest. In those two courses I have followed now, they will show what these men were doing the day of April 15. They will also explain to you the reason for them having guns, and ammunition, in their possession.

"Now, going back to South Braintree for a moment, we will offer some 12 or 15 witnesses who were stationed or working at certain points, and they will tell you what they saw of the shooting, what they saw of the men that did the shooting, and what they saw of the automobile and what they saw of the men in the automobile. [944]

"We will produce a witness who was at or near the crossing directly opposite to the cobbling shop towards the railroad track that was within six or eight feet of the automobile when it came across the railroad crossing from the lower part of Pearl Street, a man who was in South Braintree there that day on business. He arrived at the South Braintree station some time in the neighbourhood of 2:30, had some paraphernalia with him that he brought along in the train with him. He was on his way to give an exhibition in one of the schools there in glass-blowing. He left his things at the station and went over onto Pearl Street to a stable there that is near the cobbling shop, in the direction toward South Braintree centre, to procure a carriage that he might have this paraphernalia taken from the railroad station to the school at which he was to give his exhibition.

"His partner was with him. His partner remained in the stable to drive back with the man who was to furnish the team, and this witness¹ that I have mentioned or described went down Pearl Street to go back to the station, and when he got to the corner of Pearl Street and the street which runs parallel with the railroad track, at the corner there near the cobbling shop, he met an officer from Brockton who was off duty who was out having a pleasure ride with his brother.

"He stopped talking to this police officer that was from Brockton, and while talking there he heard some shots. He looked down Pearl Street and he saw the men in the street. He saw the shooting, and he started off to go down and he got nearly to the railroad tracks when the automobile came up, so he got a full-face view of the automobile, and he got a full-face view of three of the occupants in the automobile, two in the front seat and two in the rear seat, and he will tell you, as that automobile came up across those tracks, or when it first got to the first railroad track nearest the Rice & Hutchins factory, there was one man in the front seat and three in the rear seat; that he saw—or, two in the rear seat, I would say, and the man got up while the automobile was going across the track in a westerly direction on Pearl Street, one of the men got from the rear seat of the automobile over the back into the front seat and sat there, and just as he got into the seat and sat, he was just passing him and he pointed a revolver to shoot.

"The automobile, he will tell you, was going six, seven or eight miles an

¹ Burke.

hour. They were having difficulty getting up speed. The automobile was in vibration, and from the time that or just previous to its crossing the railroad tracks at the Rice & Hutchins side until it got across the railroad track and a short distance then, that all that time that automobile and those men were in his view.

"In addition to that, we will offer you a witness¹ who was then in the employ of Slater & Morrill. His duties were, I think, chasing damaged shoes or lost shoes or stock shoes, some occupation at least in the factory that took him to the lower Slater & Morrill factory a part of the day or parts of the day, and then the remainder parts of the day to the upper [945] Slater & Morrill factory, and that on the day of April 15th that he left the lower Slater & Morrill factory to go to the upper Slater & Morrill factory, and that as he walked along the sidewalk, the southerly side of Pearl Street, where the two men that you have heard described were standing against the iron fence he will tell you that just previous to the shooting—because he met Parmenter and Berardelli right at or near the railroad crossing nearest to Rice & Hutchins factory—that he had only passed these men a very short time previous and that he noticed that they were sort of nervous, turning, and with their caps pulled down, and he got suspicious of them and he stopped and paused in his walk to get a look at them, and as he came up Pearl Street he got a view of one of the men as they were passing one another, talking to one another, he got a full-face view of the man that was farthest away from him, and when he got up to go by them he sort of paused and looked around and looked at the other man in the face.

"We will offer you witnesses that were working there in the excavation where they were digging the cellar where you noticed the newly constructed restaurant. I am not going into detail, but they will take the stand and tell you what they saw and describe who they saw and tell you who they saw, so far as these defendants are concerned.

"We will offer you witnesses that were in the employ of the New York, New Haven and Hartford Railroad who were working on the track at the South Braintree crossing, just south of the crossing. I do not now recall the number of feet the men were at the time the shooting took place, but a few feet at least. I will leave that for them when they take the stand to testify. I think there are several of them that were working there, and they will tell you what they saw, and what they heard and who they saw, so far as these defendants are concerned.

"Then we will offer you witnesses who worked or who are in the employ of Slater & Morrill. The floor directly above the floor which is called the office floor where the witness Mary Splain and Margaret Devlin—if I have got the names correct—testified they were. We will offer you witnesses that worked at the window directly above them and apparently got the same view, and they will tell you what they saw and describe who they saw and who they were, so far as these defendants are concerned.

"I think that covers practically all the witnesses or places they were, all

¹ Frantello.

witnesses to identification, witnesses as to what they saw, who they saw and describe who they were at South Braintree.

"We will offer you further witnesses that have talked with several of the witnesses who testified here for the Commonwealth, tending to show that they had made previously different statements, or, statements different than the statements they made here on the stand, and that, substantially is the defendants' case.

"And I want to say to you in conclusion that when you are taking in this evidence that you will give the defendants and their witnesses the [946] same consideration, the same attention and the same patience that you have given the witnesses for the Commonwealth.

"MR. JEREMIAH MCANARNEY. Your Honor, in view of the statement of Mr. Callahan, and it is so substantially covering the whole affair, I do not think I will make any opening on behalf of the defendant Vanzetti; the two being interwoven together, it would be a good deal of repetition. Where our cases differ will be shown by the evidence." [947]

It will be observed that in this opening address counsel for the defendants referred to witnesses who were going to contradict prosecution witnesses as to the presence of the defendants at the place of the crime and to the alibis, but that there was no discussion of any other contentions of the defense. Mr. Callahan said nothing either as to the cap the prosecution claimed had been Sacco's, or as to the revolver belonging to Vanzetti. He said nothing as to how the defense intended to meet the contention that Sacco's gun had fired the fatal bullet. He was silent about explanations the defendants might offer of suspicious acts and falsehoods and made no answer to the charge of guilty consciousness. Why defendants' counsel failed to discuss these points and to prepare the minds of the jurors for the evidence they intended to develop does not appear.

The first witnesses for the defense were a photographer and a surveyor. They were followed by two eyewitnesses, BURKE and CARTER, who testified that neither defendant was one of the men he had seen at the shooting or thereafter. On the next five days numerous other persons testified, either that the defendants had not been among the bandits, or that particular witnesses for the prosecution had after the shooting made statements inconsistent with their testimony at the trial.¹ Among the eyewitnesses were a number of Spanish and Italian laborers, some of whom had worked at an excavation right opposite the scene of the shooting, some on a job near the crossing over which the automobile had fled.

There was an attempt to show that Vanzetti could not have been on the train on which Faulkner claimed he had seen him, by showing that no tickets had been sold at Plymouth or at nearby stations for Braintree or any adjoining places, and that no ticket had been taken up on the train which would account for any such passenger. It appeared, however, that the witnesses who testified could not say whether or not mileage or season tickets had been taken up on that train, but that the records of the New York,

¹ See Part II, Chapter I, pp. 205-315.

New Haven and Hartford Railroad Company would show this. No testimony about these records was produced by either side.

Of some of the defense witnesses it was said in the press that they weakened under cross-examination; of one, that he failed, when asked, to describe two of the jurors. Testimony by Mrs. LISCOMB that she never could forget the face of the bandit she had seen pointing a gun up at the factory and that this was not Sacco, was characterized as a dramatic moment. Mrs. CAMPBELL, the friend of Mrs. Andrews who contradicted the latter's testimony, broke down. These were very hot days, so hot that the jurors were permitted to sit in their shirt sleeves.

On June 28th, in order to expedite the trial, it was decided to hold court from nine in the morning until six at night. On that day a thrill was provided by a tailor, KURLANSKY, who volunteered after reading Mrs. Andrews' testimony in the newspaper. He said she had told him on the day she was for the first time taken by the police to look at Sacco, that she had been unable to identify the prisoner but was being forced into doing so. After the District Attorney had finished his cross-examination of Kurlansky Judge Thayer asked him some questions and the following transpired:

"THE COURT. Mr. Witness, I would like to ask one question. Did you attempt to find out who this person was who represented the Government who was trying to get her to take and state that which was false?

THE WITNESS. Did I what?

MR. JEREMIAH McANARNEY. What is that question?

THE COURT. Did you try to find out who it was who represented the Government?

THE WITNESS. No.

THE COURT. Why not?

THE WITNESS. Well, it didn't come into my mind. I wasn't sure, you know. It didn't—

THE COURT. Did you think the public interest was served by anybody representing the Government to try to get a woman—

THE WITNESS. I don't think of anything—

THE COURT. —to identify somebody?

THE WITNESS. I don't think of anything at all.

MR. JEREMIAH McANARNEY. Keep your voice up.

THE WITNESS. I don't think of anything like that just simply what she tell you.

THE COURT. Don't you think it would be a good idea to find out, if you could?

THE WITNESS. I think it would be.

THE COURT. I am trying to find out why you didn't do it." [1383]

The rest of that day and part of the next was occupied with the testimony of the experts for the defense, BURNS and FITZGERALD. Both maintained that the mortal bullet had not been fired through Sacco's pistol.¹

Thereafter began alibi testimony for Vanzetti.² JOSEPH SCAVITTO, who resembled Vanzetti and had been called his mysterious double testified that

¹ See pp. 360-366.

² See pp. 474-488, 497-505.

he had been drawn into the case because, slightly acquainted with Sacco, he had come to watch the trial and had there been singled out by Mr. McAnarney for his resemblance to Vanzetti. He told about having by accident put on some one else's hat one day during proceedings just as he was on his way to have the photographs made which were used at the trial in the examination of several witnesses. The hat, which he said had been casually picked up, had evidently intensified his resemblance to the defendant; and the prosecution contended the defense by design had him put it on. He said on cross-examination that he had not been at any of the places where Vanzetti had been placed by witnesses for the prosecution.

On that day, June 29th, a bullet was fired through the smoking car of the train taking reporters and others to Dedham, and George Woodbury, an investigator for the defense, was showered with splinters of glass.

Testimony by eyewitnesses, alibi witnesses¹ and character witnesses continued on June 30th. The defense at about this time found itself in financial difficulties which were temporarily relieved by a loan of three thousand dollars made by Mrs. Glendower Evans. It seems it cost one hundred and fifty dollars a day for the minutes of the trial, that the defense was paying its own witnesses, and that some of the attorneys had recently not been paid at all. Judge Thayer said he would approve a reasonable bill for such purposes to be paid by the county if the defense declared itself destitute. Such a declaration was not made.

Testimony about the good character of the defendants led to discussion and a conference between counsel. As a result of this conference the following announcement was made on July 1st by Mr. Katzmänn:

"The Commonwealth assents to the request of both of the defendants that all evidence heretofore offered in the course of this trial to the effect that either or both of said defendants bore the reputation of being peaceful and law-abiding citizens be stricken from the record of this trial, and that such evidence heretofore offered be entirely disregarded by the jury, so that as a result of striking the same from the record there is no evidence before the jury that either or both of said defendants bore the reputation of being a peaceful and law-abiding citizen." [1629]

In this way character evidence was eliminated from the case to prevent Vanzetti's witnesses from being cross-examined about his conviction for the Bridgewater hold-up. Apparently Judge Thayer and counsel were of the erroneous opinion that Vanzetti himself could not be cross-examined about this conviction because exceptions to the Supreme Judicial Court were pending undetermined. The matter was later discussed at length before the Lowell Committee, and both Thomas F. McAnarney and Katzmänn expressed the mistaken belief that the character evidence in favor of Sacco had been allowed to remain.

In view of the veiled reference to the earlier trial which had been made at this trial on the previous day, June 30th, when it was stipulated by counsel that MRS. BRINI,² an alibi witness for Vanzetti, had testified on his behalf on

¹ See pp. 474-488, 497-505.

² Her name is given as Breni in the record of the Bridgewater case.

another occasion, and in view of the very strong probability that Vanzetti's conviction was generally known, the elimination of the character evidence may have been a very high price to pay for Mr. Katzmann's silence. The District Attorney was later accused of having in his summation violated this implicit agreement because he there referred to Mrs. Brini as a stock witness for Vanzetti. That charge does not seem to be altogether just, for Mr. Katzmann did not really go beyond the statement in the record about Mrs. Brini. That statement in the record is itself inaccurate, since it suggests that Mrs. Brini had been an alibi witness for Vanzetti at the earlier trial, when in fact she had testified then to some collateral circumstances only and not to Vanzetti's movements on the day of that crime.¹ The whole episode serves to emphasize the un wisdom of the bargain made by the defense, the price for which was the elimination of all character evidence.

On the same day was read the deposition of the consular clerk, ANDROWER, shortly before taken in Italy. It confirmed Sacco's presence in Boston on April 15th, 1920, the witness remembering the date because he had noticed it on a calendar pad, and the occasion because of the unusual size of the photograph Sacco had presented. The next witness, a carpenter, RICCI, testified to having seen Sacco early on the morning of the 15th. The court room was convulsed with laughter by Mr. Katzmann's singsong repetition of dates in his cross-examination of this man. Ricci had unthinkingly testified that he had been working on a date which happened to be a Sunday, so Mr. Katzmann, by repeating dates, elicited from him the statement that he had been working on each date weekly thereafter, from April until the end of the year, without the witness once realizing that all these dates were Sundays.

Testimony was also given by a number of persons who tried to trace back the history of the revolver which Vanzetti had been carrying when arrested. According to their statements it had belonged to a man in Maine, had been brought to Massachusetts by his widow, sold by her son-in-law to Orciani, by him resold to one Falzini, and by the latter to Vanzetti. Most of the persons in this chain of title testified, but Orciani did not, although he was at various times during the trial seen about the courthouse. Not one owner had ever noticed the number of the gun.²

The illness of Mr. Jeremiah J. McAnarney caused postponement of the session of Saturday, July 2nd, and the next session was held after the holiday. On July 5th VANZETTI took the stand. It was said of him by the reporter for the *Boston Herald*:

"He used few gestures and answered questions without hesitation. Not once did he appear to lose his calm demeanor or to become excited."

Vanzetti testified about his youth and his early experiences in America, giving a summary of his life history down to April 15th, 1920. He detailed his movements on that crucial date and thereafter up to the time of his arrest. In the course of his explanation of the reason for going to the Johnson house the question of radicalism came for the first time into the case.

¹ See p. 194.

² See pp. 393-396.

Whether to bring in this topic had been the subject of serious discussion among counsel for the defense and John W. McAnarney was called in for his opinion. He believed, as was later disclosed before the Lowell Committee, that the case made out by the prosecution was such as to necessitate full disclosure by the defendants of the reasons for their acts, even if that disclosure involved bringing before the jury their radical beliefs.

The phrase "conscious guilt" is first found in J. J. McAnarney's examination of Vanzetti, when the lawyer claimed the right to show what had been going on in the witness's mind during the days prior to his arrest. Vanzetti's direct examination was, however, completed without his having given any full description of his radical activities and the fears under which he and Sacco had been laboring at the time they were arrested. All he was given the opportunity of saying was that he had not told Stewart the truth because he had been "afraid for his friends." This limiting of his testimony was due to the stubborn insistence of counsel on asking questions in a certain form instead of accepting the Judge's suggestion that the questions be differently put. Vanzetti explained he had been carrying a gun because the times were bad and he often carried a considerable sum of money on his person.

The cross-examination of the defendant took up most of the afternoon of that day and the morning of the next. Mr. Katzmann, going into the statements the witness had made when questioned after his arrest, brought out their discrepancies and untruths. Vanzetti tried to explain these on the ground that he had wanted to hide from the police and the District Attorney the names of his friends and the existence of the radical literature in their possession. As will be seen from the detailed account of this testimony in Part II, Chapter V of this book, the jury may not have believed the explanations he made. On redirect examination Vanzetti was asked about his trip to New York in connection with the Salsedo arrest and about the bearing this trip had had on his subsequent acts and those of Sacco and on their visit to the Johnson house.

SIMON JOHNSON was then called by the defense to show that Boda's automobile had not been in running order when brought to him for repairs in April, 1920. Mr. Katzmann sought to get before the jury a conversation which Johnson had had with Boda on April 30th, 1920, but after a conference with the Judge, the nature of which has not been reported, the matter was dropped.

In the afternoon, after the jury had been taken to see Boda's automobile, Sacco took the stand. Of him it was reported:

"The demeanor of Sacco, smiling and quick of speech, was noticeable by contrast with the slow, calm and careful manner in which Vanzetti gave his testimony."

Sacco's testimony in the main followed along the lines of Vanzetti's, except that his radical views and activities were more fully brought out. He, as had also Vanzetti, denied any attempt to use his gun when arrested.

Shown the cap picked up at the scene of the crime¹ and asked to try it

¹ See pp. 384-387.

on, he claimed that it could not go on, Mr. Katzmann in his summation insisted that it had fit. Contemporary newspaper accounts indicate that it did not fit. The *Herald* said:

"It stuck on the top of his head and he turned with a satisfied air to let the jury see."

On the next day, under cross-examination, he was asked to try it on again, and it was reported that the "contrast appeared less noticeable than the day before." Sacco was also shown by Mr. Katzmann a cap which he in no way described or identified, and was asked about it. This cap the police had taken from his home after the arrest; Katzmann had been unable to produce it when asked to do so by Mr. Moore the day before. Because Sacco was somewhat hesitant in his recognition of it Katzmann criticized him in his summation, charging he had falsified before the eyes of the jury.¹

During the continuation of Sacco's direct examination on July 7th, he was asked about the people who had looked him over in the Brockton police station, and said: "most of the people I could see the head very sorry, shaken." He testified that he had thought he was arrested on some radical charge and he said he had told untruths because he had not wanted to get his friends into trouble. He had owned his pistol, he said, for many years and, intending to fire off in the woods some of the shells he had in the house prior to his departure for Italy, he had slipped the pistol into his belt on the afternoon of May 5th, and had then forgotten about it when leaving for West Bridgewater.

The cross-examination of Sacco took place on one of the hottest of that summer's hot days. It was long and searching. The first part of it covers over twenty closely printed pages of the record. It deals with his opinions and will be found in full in Part II, Chapter V of this book.

During this cross-examination Judge Thayer, in discussing an objection to a question about Sacco's love of his country, said the defense had opened the matter up and asked Mr. J. J. McAnarney:

"Are you going to claim much of all the collection of the literature and the books was really in the interest of the United States as well as these people and therefore it has opened up the credibility of the defendant when he claims that all that work was done really for the interest of the United States in getting this literature out of the way?" [1873]

Mr. McAnarney did not seem to understand the question, Sacco never having claimed that he was in any way acting in the interests of the United States. When the question was repeated by the Judge Mr. McAnarney disclaimed any intention of making such a contention. Nevertheless Judge Thayer, after further discussion, again asked: "Are you going to claim that what the defendant did was in the interest of the United States?" Mr. McAnarney objected to the question as prejudicial to the defendants and the Judge, after more discussion, stated to the jury that no prejudice was intended, but permitted Mr. Katzmann to ask Sacco what he had meant

¹ See pp. 84, 85.

when on direct examination he had said he loved a free country. In answer Sacco made a ten-minute speech giving his general ideas of freedom, education and war.

Of the defendant's demeanor under cross-examination the *Herald* said the next day:

"Sacco appeared at times to be at a loss for words in which to explain the consistency of the falsehoods he told Dist. Atty. Katzmann."

The day's cross-examination ended with an inquiry about the defendant's statement made to Mr. Katzmann at Brockton that he had worked the day before the one on which he read in the papers of the South Braintree murders. At the next session he asked for the interpreter, and testified through him that he would neither admit nor deny having made that statement about being at work, and finally, that he had then told Katzmann he could not be certain about it. Difficulties arose with the interpreter, Ross, who was being checked by an unofficial interpreter for the defense. It was not the only occasion during the trial on which such difficulties came up, and similar discussions, some in the absence of the jury, frequently took place.

There was a brief redirect-examination in the course of which Sacco said he did not believe in the use of force or violence "to destroy property or individuals." An adjournment was then taken until July 9th because Vanzetti was ill. Sacco's examination was completed on the ninth after some reference to letters received from members of his family in Italy relating to his mother's death and to his projected visit there. The original letter from his father announcing his mother's death had apparently been lost and was not produced. Letters written at a subsequent date were read to the jury a few days later.

Sacco was last questioned about a man whom he claimed to have noticed on the train in which he had returned to Stoughton on the afternoon of April 15th, and to have again seen in the court during the trial.¹ But as that man was not then in court the subject was dropped. On Monday, July 11th, the man referred to, HAYES, appeared, testified that he had returned from Boston on a late afternoon train on April 15th and described his position in the car in which he had been riding. Hayes, a surveyor, had been asked by the defense to give some information about streets, and later came to the trial to listen. Sacco, recalled, said he had been sitting across the aisle from Hayes on that train and described Hayes's position just as Hayes himself had done. Each gave his testimony in the absence of the other and Hayes said he had not discussed this matter of location in the train before testifying. He said he had not noticed Sacco on that occasion.

On July 9th and July 11th various witnesses testified about Vanzetti's trip to New York, about the advice he had received there and about how it had been acted upon by his radical friends after his return. There was also further testimony by alibi witnesses, among others by GUADAGNI,² editor of the *Gazetta de Massachusetts*. Guadagni was one of the witnesses who fixed

¹ See pp. 477, 478, 482, 483.

² In the record of the trial the name is: Guadenagi.

the date of his having seen Sacco in Boston as April 15th, 1920, by reference to a dinner given on that day to a certain Williams, editor of the *Boston Transcript*. There was difference of opinion among the witnesses about the time of the banquet to Williams, some stating it had taken place at noon, before they had seen Sacco, others that it had been about to take place that night.

MRS. SACCO testified about her husband's movements on the day of his arrest and on the day of the crimes, about the caps he wore, the shotgun shells which Vanzetti had taken from her home, and the letters from Italy. She also told about the savings account in her name.

Just before she took the stand letters written to Sacco from Italy on April 12th, 1920 were read to the jury. The Holt record omits the letter from Sacco's father and prints only the postscript from the brother and sister. The letter from the father is therefore taken from the *Boston Herald*. The entire correspondence follows:

"Torremaggiore April 12, 1920.

"DEAR SON—I am answering your letter received from you a few days ago. We are very sorry that you wrote about your mother. You said in your letter that you sent her shawl, but we have not received it yet. I hope that you will arrive first. Your sisters will keep the shawl for you. Dear son, I know very well that because of the receipt of news of your mother's death you are very grieved. But I pray you not to forget to come back, as you have promised that you will be back by May. We are desirous to see you. Just think how anxious we are of seeing you, after having a son away 11 years. What you must do is to embark the moment you receive this letter. I am constantly thinking of you. In regard to the house, it is ready. I have rented it. I hope to see you soon to come to console our hearts. You said that Marietta and Felicetta are angry with you. It is not true, as I told you in the other letter. They did not write because they were waiting for your mother's condition to improve, so that they could give you good news. Instead you received the painful news of her death. I have nothing more to say. Accept kisses from your brothers and sisters. A thousand kisses from me to you and your wife and son.

"Your father
"SACCO MICHELE."

"DEAR BROTHER,

Don't forget what I am telling you. When you come please bring me a black velvet coat of American style because such fine clothing does not exist here. Pay any price for when you come back I will pay for it.

"DEAR ROSINA,

I pray you to use your judgment for you know better how to select, but it must be of black velvet. Come quick for we are desirous to make your acquaintance and that of our dear nephew, Dante. We await you with open arms. Oh, when will that day come when we receive a telegram that you have arrived in Naples! I hope that that moment will be here soon.

"DEAR ROSINA,

I beg you to tell my brother to start at once to come to keep us company. We are alone without anybody. During the day our sister-in-law Genoveffa

comes to keep us company. I have nothing else to say. I hope you will come quick for we are awaiting you. Accept kisses from us.

"MARIETTO AND FELICETTO." [2047]

On July 12th, after presenting some minor bits of testimony, the defense rested. There was only brief rebuttal. Ricci, the foreman of the gang of railroad workers claimed that none of these had reached the crossing in time to see the bandit car go by. Asked about a spring to which one of the laborers said he had gone for water, he made the comment:

"The company got to fill up at the time of the war for fear they put in something." [2081]

Vanzetti later criticized this piece of evidence as an attempt to prejudice the jury because of the defendants' opposition to war.¹

Several persons contradicted testimony by witnesses for the defense. Stewart denied a remark attributed to him to the effect that the defendants were not the right men. He also read to the jury those parts of the statements taken from the defendants which had originally been excluded because they dealt with their opinions. Finally, a man named HAWLEY was permitted to testify that he had seen Vanzetti with several other persons on April 1st, 1920, in a Buick automobile in Brockton. With the reading by Mr. Katzmman of the circular found on Sacco when arrested (quoted at page 12) and the placing in evidence of the books and pamphlets taken from Sacco's house, the case closed. These were on various socialist and revolutionary subjects [2146].

d. *The Summations*

The whole of the next day, July 14th, was taken up by the summation of counsel. Mr. Moore made a rather rambling argument,² towards the end of which he said:

"But Mr. Katzmman will then tell you some other things that Sacco did not remember or could not tell. Now, I am not going to pretend to you gentlemen that all that Sacco said to Mr. Katzmman was predicated upon the fear that he was going to get in trouble over selective service or over his war attitude or anything of that kind. That is not my position. I am explaining solely and exclusively the Johnson episode on that issue. In-so[2144]far as Sacco's other statements, to wit, the most flagrant example, 'Did you work on April 15th?' there is a pure matter of recollection. It is manifest from the record that Sacco did his best to tell Mr. Katzmman all the truth as he was best able to recollect it. And I say to you, gentlemen, if there is any one of you that has ever been mixed up in the preparation of either a civil or a criminal case, any of you, I do not believe there is a man in this box but what if he came to any one of us of counsel in connection with a small sized petty civil matter and we began to check you back on your dates that you would have an awful lot of trouble to tell where you were 30 days, 60 days or 90 days back. It is a hard job, gentlemen and remember that that boy was under arrest at that time. Is it any wonder that he was

¹ See p. 141.

² Other parts of his summation are referred to in Part II, pp. 308-310, 366, 386, 457, 458, 485, 504.

uncertain? Is it any wonder that upon questions of exact dates he wavered?

"But that is not the issue. Insofar as the question of his working on April 15th is concerned there ought not to be any question. Why, gentlemen, what have you got to do in this case in order to return a verdict? You have got to say that the whole Kelley family lied. You have got to say that some 20 odd witnesses called in connection with various phases of the movement of the defendant are all liars, unequivocal, unmitigated, unfaltering liars, and on top of that you have got to say that we of counsel had aided, abetted, advised, encouraged this perjury. [2145] . . .

"There are some other questions, many, that I would like to discuss. The issue of the government, you have heard the testimony of the experts pro and con, back and forth. Gentlemen, if the time has come when a microscope must be used to determine whether a human life is going to continue to function or not and when the users of the microscope themselves can't agree, when experts called by the Commonwealth and experts called by the defense are sharply defined in their disagreements, then I take it that ordinary men such as you and I should well hesitate to take a human life. [2147] . . .

"In other words, let no consideration of public policy, let no consideration of compromise, let no consideration of anything other than the proven evidence on the witness stand direct and command your minds. Gentlemen, please, I beg of you, and I speak on behalf of the defendant Sacco and I feel I may say on behalf of the defendant Vanzetti, I beg of you, gentlemen, one and all, please, no compromise verdicts in this case. There can be but one verdict here, either murder in the first degree with the death penalty or not guilty, one or the other." [2148]

After discussing the evidence, Mr. Jeremiah J. McAnarney¹ argued as follows upon the probabilities of the case.

"That Sacco, known as he was—on their own evidence—who is within 15 feet of the windows of the Rice & Hutchins factory, right there for hours, standing up in front of the drug store on the corner, the best place he could expose himself, in the depot where that big man, physically, said he saw him, where every one saw him, knowing that he was known, knowing that he had worked there, getting the money and getting away? No. And he is back to work in the factory the next morning.

"Vanzetti with his playing around in his usual—whether it is fishing or work, I don't know. Gentlemen, does that appeal to you as the ordinary human reasoning? If every lawyer, judge and juror in this Commonwealth died and we had no court, would it require any court or require an instructor to show to you that that is utter, it is the pinnacle of foolishness? You can't get beyond that. If this man pulled that job at night, if he was masked, if he was concealed in some way, he might take the chance of staying around, but here, in broad daylight, absolutely in the presence of every man that he could show himself to, no disguise at all, getting away with the money in Braintree and he is back in the factory the next morning where he can be picked up when they get ready to take him. The same with Vanzetti.

"Now, gentlemen, isn't there enough right there to satisfy you that that isn't the way the ordinary mind acts? And gentlemen, when you weigh this case and any part of this case, it isn't what witnesses say, it isn't what at-

¹ Other parts of his summation are referred to in Part II, pp. 311, 312, 366, 386, 400, 458, 459, 485, 504, 505.

torneys argue, but you take what the ordinary human mind would probably do under the same circumstances, and you have got a pretty fair rule to get the answer. Take what the ordinary man would do under those circumstances.

"If he now got that money and got into his car by the taking of those two lives away, he knew that the limb of the law of the United States was against him, and he wouldn't be—it is foolish to say he would take a chance and he would go back to the factory. These men are brighter than that. They don't understand our language very well, but when you strip those men from their broken English you have got more than the ordinary type of fellow.

"The poise of Vanzetti as he spoke on that stand, courteously and gently to the district attorney, and after he was stripped of everything that a man holds dear, to wit, his honor, his poise was simply wonderful.

"You and I are the product of our own environment. You don't owe yourself many bouquets. To your good father and mother you owe your present situation plus as you came up through, your school. When you judge another man, don't judge him from the way you were brought up in [2157] your home. Judge that human mind with its weaknesses and all in the home that that mind came through and came up.

"I am saying something that I want to see sink in the heart of every man on this panel, other than that you make a mistake. I bear no brief for a radical, a man, I mean, who would in any way seek to destroy this best government in the world, but you know, gentlemen, there is a vast difference between the man and his opinions. The laws of today as being put on our statute books in the state and the national legislature 50 years ago were the ultra of radicalism, don't mistake that.

"I oppose any man who would violate the laws of the land or seek in any way to destroy this government. That isn't in my blood and never can be, but he who is a student of the times of today knows that what I say is true, that the legislation that has taken place today was the radicalism of 50 years ago. If in that over one hour or almost two hours of the district attorney with Vanzetti, if he preached anything there that was very bad, silence is the answer of the district attorney in regard to it. It has not been quoted to you from that somewhat large volume that he had in his hand containing an interview he had with Vanzetti that night. Where that is silent I say to you it speaks volumes in favour of Vanzetti.

"Take again—carrying them both—I hope I don't hurt them because Brother Moore should take Sacco—but they have put them here together, and they in a way are going along together. What was there in this case to make him a bandit? Why of all men could he have been? Who has got a better brief than that fellow, 6 or 7 years up there in Milford, working every day, some credit anyway to him. I will come to it later what he did in the war times.

"He comes back to the 3-K. What manner of man was he there? Wasn't he a working man working every day and at home with his family, saving his money? No doubt he had aspirations for his boy and love for his wife and affection for her. Unfortunately, he says, he was a republican. Well, you have got a peculiar mentality when you have a boy 19 years of age who has such intellectual grasp—though it may be on a slant—nevertheless give him credit when he has brains enough to know whether he is a

republican or not. There is some good in that man if it is turned in the right channel. Pick up the boy today—they are no credit to any government—and ask them whether they are republican or what their ideas be! These fellows usually, however, don't know much about that thing.

"These fellows come in and they floated along. Up to this situation here they were as ordinary fellows. Now, Sacco has met with the situation, sickness at home. What was his home? His mother had died, and he has told you he had some letters. He showed to Kelley the letter that came to him about the first. Kelley says so. He went, and he had been promising before. That is plain on the terms of the letter—he was going home, and that he hurried up then. He had been, he said, the last week [2158] in March into the consul to get general information that he would have to have a photograph. Then he had hurried up and went in on the 15th.

"Now, gentlemen, he was acting in a natural way. What kind of family did he come out of? What was there in the situation there at home other than kindly affection and a wish for that fellow to come home. He had been saving his money in the bank. He had his wife and child. Was he the type of man who would be out doing a hold-up job, he with his father ill, with his mother dead, and the people at home advising him to come home to his father?

"He wished to see him before he died, no doubt, and he, wanting to go home, was he in the mental frame to go out and do a job of murder right there on the street? You have got to weight those things, gentlemen, and as bearing on that, gentlemen, you will have the letter from his folks. Read that over carefully and it will give you an idea of what kind of people his folks were, his father was, a father who can write the letter and show the tender sentiments and beautiful expression in that letter. This boy got his mentality from that father. And read the nice loyal tone of the letter from the sister. They are not solemn. There are elevated sentiments and beautiful expression even in the crude translation, and that is the home that this boy came from. [2159]"

Discussing the claim that the defendants had shown consciousness of guilt he said:

"Gentlemen, doesn't that fairly and squarely dispose of the matter and place it just where these two unfortunate fellows say it ought to have been, just exactly as they say that when they got up there to the bridge they saw the light over there and they went over to it and then the talk took place? Is there anything other than what Johnson says, that the headlight played on it, when he said he did talk with him and that he did not have the number plate? Is there anything other than what Vanzetti says, that they were coming again when he would arrange to get the automobile?

"These men lied. They lied and lied when they were arrested. Please why? What for? My brother says to Sacco, 'When you were arrested, it had all happened. Nothing else counted when arrested.' Yes, there could be more. A man is arrested, but that is different from being convicted. He said, 'They had Orciani. You knew that. Why did you lie that you did not know Orciani?'

"They were informed with knowledge of what had transpired in New York. They knew their position exactly without any question. They knew they were amenable to something. The answer to the whole situation is this.

Not one man on that panel believes that Mrs. Sacco was cognizant of any murders or crimes like that. Why did she lie? Was that because she was conscious of any guilt of the shooting at Braintree? She did just [2164] what her husband did. She just did the same as Vanzetti did. She concealed from those officials the truth. Why? Because of what she burned up the next day, and that is what was in the car. She burned the papers and saved the books.

"Doesn't that tell you right in your own heart, every man here, she did just exactly what Vanzetti and Sacco did, just exactly, and she was no party, no man here who looked at that woman would believe she was a party to these murders. Her conduct was as guilty, as suspicious as Vanzetti and her husband, and she did the same as they did. She concealed from them the facts." [2165]

Mr. McAnarney dealt also with the argument based on the fact that the defendants had been armed:

"There is one thing you want to bear in mind. Please don't construe the ordinary man by an Italian. If you go out and flock a dozen Italians together, the chances are you will get a gun or two, anyway. You could handle one hundred—fifty other men and you won't find a revolver. . . . [2170]

"And the revolver is on their person, the revolver Vanzetti has in his hip pocket, and Sacco carries it where, if you are acquainted with—and where since the war—police matters you will find where most men who have been across carry the gun that you read of from time to time in the belt rather than the hip pockets. They had those guns. Then did that prove they were guilty of the Braintree murder? I say all of Connolly—take him out of this case, no other man on that car saw anything like Connolly saw. No other man heard the ring—the welkin ring with that wonderful voice when he made those fearful remarks to these poor men because they couldn't move their hand toward their stomach outside of their coats. Out of this case goes that, and if out of this case goes that, all question of conscious guilt shown you on that Braintree matter is out of this case. They have got to get conscious guilt in there someway. They have got to get conscious guilt into this case because that identification will not stand the test. It will not stand the acid test of truth. Vanzetti can only say to you he did not have Alvin Fuller, he did not have Louis Frothingham down there on this case to come in and testify to you. He has only got the poor people he travelled with and who know him, joking with the Jewish fellow,¹ who sold him cloth. But the more my brother pricked that fellow, the more he began to ring true. He was funny as could be, but as he came along he told enough. He pretty near made an iron proof safe there. Did Vanzetti buy of him or did he not?

"Vanzetti has given you the history of his days covering that period. He has been interviewed by the district attorney for over one hour, and if he was wrong in any one of those days other than that day it would have been read to you, and the failure to show error in one bit of Vanzetti's replies is absolute proof to you he pretty near told the truth on the witness stand.

"Vanzetti, 11 years down there in Plymouth. You saw the mentality of that man. Is he intelligent? Would he be bobbing up and down at every station to see where East Braintree was?" [2171]

¹ Rosen.

Continuing about Vanzetti he said:

"But going back to my client, Vanzetti, all there is against Vanzetti is what? That he happened to be alive at this time, that is about all. We got Parkhurst, [Faulkner], who has picked out anything but Vanzetti on the train; we have got Levangie, and take Levangie, and if you ever meet him tell him what you think of him. He says that Vanzetti was driving the car. And what else have you got now but the fellow up to Bridgewater? That is all there is against this man Vanzetti, except that he, unmarried, patriotic in his way, was after having been to New York and was going to go through and help his fellow men out.

"And, gentlemen, it does seem awful when you just think of this case. They are denied, you say. They are radicals. Please, what of it? When they said—when Sacco said he hadn't worked at Rice & Hutchins, it only meant one thing. If he disclosed that then he would have disclosed the other and then he was liable for arrest. Isn't that the whole thing, Gentlemen, in this case?

"I assure you I know my brother's power. You know his honor and his ability, and I repeat to you that no district attorney ever had such a wonderful story to say to you as he can say here. But you gentlemen, you are here today, and may you live long, and I know that your decision when you make it in this case will be such that your feeling ever afterwards will be that you did right, that you did right in this case. It is easy to ask you to do that, mighty easy. It is almost hard for you to do it. You had right there in Braintree two men whose lives were snuffed out. No question about that. Somebody is guilty of that. This is [2174] not that case. That case is only incidental. Those lives were not incidental, but we are not joining issue on that murder. The only issue here is the identification, and when I say to you what I have said, I have passed the details of this identification, because no human mind can come to anything other than utter confusion as to that identification in every part of it. If it leaves anything with you, it leaves the biggest, most wholesome reasonable doubt that ever was, and no man would want a friend of his convicted on that identification.

"But unfortunately they were laying a trap for Coacci and Boda, and when that trap was sprung, Vanzetti and Sacco unfortunately were in it. That was the unfortunate thing for those two. Coacci was wanted, and he got it pretty quick, in his line. Boda was wanted when they were ready on him.

"Now, gentlemen, that is all there is to this whole case except the very, very unpleasant feeling that you have, that you in your duty here that you have to spend your time and have been asked to, in a way, help men who you are not in sympathy with. I realize the burden I am carrying—I realize every bit of it—and I am asking of you men the almost impossible. [2175] . . .

"Take the little wife here, Vanzetti bidding her good bye, and asking her to send a message. What did that mean, gentlemen? Were they not parting then, she going home and her husband, expecting for the last time that this friend of her husband's would be with her? What did that good-bye mean; only the truth of our case, gentlemen.

"Why, gentlemen, when you argue on this case, when you feel and feel properly for these men, your whole nature will recoil with anguish at the unfortunate position that they are being placed in by this situation. The

truth of this case stands where I said it stood at the beginning, that there were times that were unfortunate, that their beliefs for them were unfortunate, that when at that meeting this man was delegated—he had not concealed that he went to New York, and you may have read or you may know, you may know or you may not what Sacco has said to you of what occurred there, that he reported it back to that meeting and then this followed, and as much as it ever could be proved from that source we have proven it, and, gentlemen, take it. [2176]

"The dignity of that consulate, the Italian consulate. And there is as much pride and dignity in the heart of an Italian as there is in any other man and that Andrea is not going to falsify his name for a murderer though he be a fellow countryman; and a dignitary of that consulate says to you he was there on the 15th." [2177]

In conclusion Mr. McAnarney argued:

"I will take all the blame—I will take all the lies that they say we lied about, we have lied all through every time they asked us where we were or our whereabouts, we lied just as well as that little wife did, and for that very reason. I am not asking sympathy for her in any way, remarkable little woman that she is. If her husband is a murderer, that is unfortunate for her, but that cannot stop justice being done, but if this case were what they say it was, if this case stood on its feet there would be no need to try to put Vanzetti in possession of Berardelli's gun, that never on the records was taken out of Iver-Johnson's. If this case had strength enough to stand on its own feet, it never would have been propped up by fiction; if that woman¹ with whom Mrs. Berardelli lived from the day after her husband's burial and stayed with her five months, her friend, if what that woman told you on the stand wasn't true, then Mrs. Berardelli would have been called here to contradict her.

"If that is true, then you know all this camouflage about the Berardelli gun is simply to put that gun into the possession of Vanzetti, and if that is Berardelli's gun, of course he is guilty, unless he got it through some circle, but you would say he was guilty and I would say he was guilty, and when I can say to you—and oh, I hate to repeat it, but it must ring your minds and hearts for that woman to say that the spring of that revolver was what was broken and they put a man on to tell you there is a new hammer in there, what can such work mean, not when two men have taken \$125, but when the taking of all that is sacred in this world, when the [2178] preserving of the prerogatives of the Almighty are involved, and such fabrication as that is here what can we think?

"This case has no parallel in the history of Massachusetts criminal jurisdiction. I ask your consideration if at times we have taken time. We have had discussion, but we try to eliminate by our discussion at the bench evidence which would take considerable of your time if we did not do it. I thank every man of you from the bottom of my heart for the consideration you have given this case, and I want every man, too, of this panel to treat these two defendants as if they were your own individual brother. Take that as the test, not the other that we feel and what this evidence would make them out, treat them as though, as your brother. He came to this world by the same power that created you, and may he go from this world by the same power that takes you. I thank you, gentlemen." [2179]

¹ Mrs. Florence.

Four and one half hours had been consumed by the summation for the defendants and Mr. Katzmann was allowed the same amount of time.

Mr. Katzmann¹ spoke the whole afternoon. He began with a tribute to the skill and devotion with which the defense had been conducted:

"And while I am speaking gentlemen in passing and before opening either upon the law or the facts in my argument, I want to congratulate both of these defendants upon the quality of the defense that they have had through the medium of two trained, skillful and experienced attorneys. They could not be more ably defended. Neither could they be defended with greater devotion to duty than have the gentlemen who have been representing them exercised and performed. But above that and above the fact that there are 12 good men from Norfolk County who are not going to be swayed either by prejudice or by fear, nor, worse than anything else, by emotion, that would make them fail in their duty, you 12 men, this trial has been presided over by a Justice of eminent person attainment." [2180]

He then attacked the witnesses for the defense, particularly those who had testified to Vanzetti's alibi:

"I have listened to the arguments of learned counsel through a long morning, and I have wondered why it was that the tremendous force of personality and argument exhibited by both counsel has been directed almost entirely, gentlemen of the jury, to the defense of the defendant Sacco and almost not an appreciable portion of either argument devoted to the defense of the defendant Vanzetti.

"Is it, gentlemen of the jury, that neither counsel who have argued to you have confidence in the alibi of the defendant Vanzetti, and that it is hopeless in their opinion, and that all their tremendous effort and intelligence must be directed to pulling out a verdict in favor of the defendant Sacco if they can, and that the alibi of the defendant Vanzetti does not satisfy these two gentlemen themselves? It may well be, gentlemen, but whatever the opinion of counsel, myself or the defendants' counsel, that is of no consequence to you. We are not allowed to express our personal opinions to you. It is not evidence. You are the men who are going to determine what the facts are; and I ask you to consider, in the light of what has transpired this very morning in this court room, if that is not a fact that you may well find.

"It is akin, gentlemen of the jury, to the opening made by other learned, skillful and experienced counsel. He never whispered a word to you, gentlemen, when he opened this case, as to where Vanzetti was on April 15th. And more than that, gentlemen, he never even suggested on the day that he opened this case for the defense, that they were prepared [2181] to admit that the defendants, Sacco and Vanzetti, were down in West Bridgewater at Simon Johnson's house on the night of May 5th, and if I forget everything else in my argument in what I conceive to be the orderly presentation of it, I hope I won't overlook that, gentlemen, because it is of tremendous probative force. The acts of counsel, gentlemen, bind the defendants themselves. [2182] . . .

¹ For other parts of his summation, see Part II, pp. 312-315, 366, 386, 387, 394, 400, 401, 459, 460, 472, 473, 486, 487, 496, 505, 506.

"The next portion of the defense is that of alibi; as to the defendant Vanzetti first and as to the defendant Sacco. I am going to do more than Vanzetti's own counsel, because I am going to discuss it, and I submit to you respectfully, they almost entirely neglected to discuss it. Maybe I may exercise poor judgment if that is the way they feel about it, but this is murder, gentlemen. This is a serious matter and I am seeking to have you on your consciences bring in a verdict of guilty, but I want it not upon snap judgment, nor upon snap argument. I want it upon careful consideration. . . .

"Take Rosen, take Mrs. Brini—Mrs. Brini, a convenient witness for this defendant Vanzetti. You remember him, gentlemen, that it was stated by an agreement of counsel that Mrs. Brini, in whose husband's home the defendant Vanzetti lived the first four years that he ever lived in Plymouth and whose daughter Lefavre, the little 16 year old girl said of Vanzetti that he was the most intimate friend and was like one of the family and there most every evening and once or twice in a day time—Mrs. Brini, it is agreed in another cause when another date was alleged, testified to the whereabouts of this same Vanzetti on that other date there involved, a stock, convenient and ready witness as well as friend of the defendant Vanzetti. [2192] . . .

"And you are expected to believe his testimony, and you are expected to believe his testimony on the cow and barn theory, because he produced a receipt of an over-due poll tax bill he says his wife paid in his absence and he saw it the next day, April 16, and in the next breath, gentlemen, he says he stayed at Whitman the night of the 15th.

"And what are you to say with such testimony as that? Oh, it is true. Oh, it must be true, and how do they prove it? Why, gentlemen, they brought the cloth here with the hole in it. Of course, then you knew that was bought on the 15th. The minute you saw the hole in the blue piece of cloth you instantly knew that Mrs. Brini, Lefavre Brini, the daughter, and Joe Rosen were all right because there was the hole in the cloth.

"That is the alibi defense in this case. I have not begun to do it justice, and the only way that justice could be done to it in its full absurdity and [2196] utter lack of convincing qualities would be to read every word of it and you would be here very likely until Labor Day." [2197]

Mr. Katzmman turned to the radical explanation offered by the defense:

"The third defense, gentlemen, from which I can't seem to get away in my own mind, is the one that was born after the opening of this case for the defense. Gentlemen, I say that to you advisedly. I am fully aware of the importance of the words I am using, and I ask you to follow me while I give you the reasons why I said that this explanation of the consciousness of guilt shown by the actions of these defendants at Simon Johnson's house, in the street railway car to the officers and the police station is something the defendants themselves had never entrusted even to their own lawyers until the exigency of the case demanded it.

"Why do I say that, gentlemen? Will you ever forget the cross-examination of Ruth Johnson who was the first of the two Johnsons to take the stand, the little lady who lived near the bridge on West Main Street in West Bridgewater? Or will you forget the cross-examination that was made of her husband, Simon Johnson? It included many things, gentlemen.

"The manifest purpose mainly of those two cross-examinations, however, must have been evident to you. It was to break down the identification of Ruth and Simon Johnson of the defendant Sacco and of the defendant Vanzetti on the allegation of the Commonwealth, gentlemen, given through the testimony of those two witnesses that both of these defendants were out in front of the Simon Johnson house on the night of May 5th. . . .

"Do you believe that two learned gentlemen of the experience of my brothers McAnarney and Moore would have taken the time or have made the physical and mental effort to break down the identifications had they been entrusted with their own clients' story that they were going to go on the stand and admit they were down there that night? An utter waste of time of which these two gentlemen would not be guilty. [2197] . . .

"They both stubbornly resist any suggestion that she is right that they followed her up, and they have good cause for resisting that assertion, because it shows you, gentlemen, that their story could not possibly be true on consciousness of guilt for a slacker job, for the fact that they deserted this country that has been good enough for them both to live in a good many years, or possibly because of their possessing literature, because of the fact they saw a woman go in a house and come back.

"If I was a mind reader, as I decline, and Ruth Johnson came so close, the first thing,—and they had no reason to feel she was—to suggest itself would be, Why is it they don't want to be seen going up with Ruth Johnson? Because they could not possibly explain that on the basis of literature or of their being slackers, a woman whom they did not know, or if they knew, she did not know them. So they both evaded that and say, 'No, in that respect her statement is not true. We came up there after she had gone up.' [2201] . . .

"Would you suppose these men who had not gotten the automobile, who had not taken it out of the garage and who did not have a single scrap of Socialistic, Anarchistic or whatever type of literature they were afraid of, or any books of the sort in their physical possession, who were simply men who were on foot out there that night and had not accomplished their primary design of obtaining that automobile? What was there for them to be afraid of?

"To use the vernacular, 'Nobody had the goods on them then.' There was no literature in any automobile in which they were seated. There was no literature in their pockets. They were in the same condition, as far as the literature was concerned, as they are now. Whatever might have been in their minds could not be discerned by the authorities nor apprehended. They had no literature.

"But they had arsenals upon them. Vanzetti had a loaded 38 calibre revolver, this man who ran to Mexico because he did not want to shoot a fellow human being in warfare, a loaded 38 calibre revolver, any one of the cartridges instantly death dealing. This tender-hearted man who loved this country and who went down to Mexico because he did not believe in shooting a fellow human being, going down to get a decrepit old automobile, had a 38 calibre loaded gun on him.

"And his friend and associate, Nicola Sacco, another lover of peace, another lover of his adopted country who abhorred bloodshed and abhorred it so that he went down to Mexico under the name of Musmacotelli to avoid bearing arms either for his adopted country, or, if he refused it, being an

allied nation then when we were in distress, would have been forced to fight for his native land under the registration, had with him, this lover of peace, 32 death dealing automatic cartridges, 9 of them in the gun ready for action and 22 more of them in his pocket,—carried where the ordinary citizen carries it there? [2203] . . .

"Perhaps you believe that this man who brings volume after volume, in, Nicola Sacco, to show his learning and his desire to improve himself mentally perhaps you believe that he is such a dullard that when the question is put to him after step by step, if he knew about this,—

"Q. Did you read it the next morning after it happened in the papers? A. Yes.

"Q. Where were you the day before you read it in the papers? A. I was working all days.' That he did not know it.

"Will you tell me in the name of reason, gentlemen of this jury, what consciousness of guilt of having possession of Socialistic literature up in his little house in Stoughton had to do with that falsehood? Or was he denying where he was the day before he read it in the paper because he was conscious of his guilt from participation in that crime itself? Can there be any other conclusion that 13 men of commonsense can draw?

"And you remember a similar question of the defendant Vanzetti, not surrounded, however, I am free to say, in justice to that defendant, as were the questions that I asked at length and which I read to you about the South Braintree murder, if he knew where he was on the Thursday before the holiday that fell on the 19th of April, first calling his attention to when that holiday fell, the fact that it fell on Monday of a week, and he said, 'No, he did not know.'

"There is no suggestion from either of these defendants that the examination was conducted unfairly or that it was conducted hurriedly or that, as far as I was concerned that there was any attempt to confuse or to frighten or to press down upon them. Even Sacco does not make that allegation as to the officers.

"But it fell to the man Vanzetti, the man who showed the gruff voice because he could not control himself because again he was facing his natural enemy, a police officer, Connolly, when he was on the stand, and he showed that same quality of gruff voice that he shows under emotion and excitement that Austin Reed told you about, the crossing tender at Mat[2207]field, when he wanted to know why in 'H' they were holding him up, when Connolly got to that part of his testimony when he said, 'When I came in the car, Vanzetti made a move to his pocket.'

"Will you ever forget the uncontrollable outburst of the defendant Vanzetti, keen enough to realize that condemned any consciousness of guilt theory of a minor offense, of which the authorities had no proof whatever. 'You are a liar' burst from his lips when Connolly told about that move.

"And then you tell me, gentlemen of this jury, that the defendant Vanzetti was conscious of his guilt of any misdemeanor when he was trying to pull that gun on an officer of the law, and that that was why he falsified upon falsification?" [2208]

Mr. Katzmman charged Sacco with having denied ownership of his own cap, a charge which provoked protest from Mr. Moore:

"But that is not all, gentlemen. He has falsified to you before your very faces. When Exhibit 43, his own cap that Lieut. Guerin says he got out of his own house was produced and shown to him before Lieut. Guerin testified he would not admit, gentlemen, that his own cap was his. What is there about that cap, which admittedly was not picked up on the scene of the murder, that would drive him from truth? Do you believe Guerin? . . .

"And Sacco denied it. Why, gentlemen of the jury? It is too obvious to need argument. The reason he denied it was because this cap that was picked up by—

"MR. MOORE. If your Honor please, I will ask either the retraction of the statement that the defendant denied that that was his hat or a reading of the record. My recollection of the record is that the defendant stated in the first instance, that it was; in the second instance on pressing that he wasn't sure because he thought his cap was a little lighter. Now, that is my recollection of the testimony. At no time did he say positively that it was not his hat. Neither would he say positively that it was or positively that it was not.

THE COURT. That is my recollection of the testimony. [2209]

MR. MOORE. Take an exception.

THE COURT. But it is for you gentlemen to determine what the evidence was.

MR. KATZMANN. Gentlemen, I trust—I am grateful to Mr. Moore for interrupting—I trust that in so important a case as a charge of murder against two human beings, that I would not permit myself to stray a thousandth part from the testimony as I recall it. I am not attempting to repeat to you what has taken six weeks to utter before you word for word." [2210]

After reviewing part of Sacco's testimony on the subject he said: "Isn't it a denial of the ownership of the cap?"

Taking up the trying on of this cap he argued:

"Then came the episode of trying the cap on. Not his first trial of the cap, gentlemen, since it had been first produced in evidence, as you well might have believed if there had not been cross-examination, because it was tried on in your absence early one evening when we were out. You went out for recess. It was first handed to him, and properly so, by his counsel. He tried it on. Then he put it on his head, and it rested there, and then he pulled it down, and I submit to you gentlemen that that dark hat, which is the hat of the man who killed Alessandro Berardelli—because the man who killed Alessandro Berardelli went away bare headed in that automobile—fits the head of the defendant Sacco exactly the same as does the hat that on the testimony of Guerin you would be warranted and should find is his hat.

"Don't take my word for that, gentlemen. It is too serious a matter, because it is absolutely condemnatory of this defendant. No, not absolutely, but it clinches on the top of all the other circumstances. Some one of you who wears a $7\frac{1}{8}$, if that is the size of those caps, try them both on. There is the acid test for you, gentlemen. Don't take anybody's word. [2210] Don't take Sacco's or anybody else. Try the caps on yourself, and if they are not identically of the same size. then so find, so find, gentlemen.

"And more than that, I ask you to try it on, not this way (indicating)

which would give more arc. Try it on with this (indicating) on. You saw Sacco do it. When he pulled this cap down, a heavier cap, twice the weight of that (indicating) and not any such degree of stretch as there is in that cap, didn't it go down over his head? Wasn't the line exactly the same with this cap as with the other. At least, gentlemen, it is uncontrollably, if that is the fact, that then the cap fits the defendant Sacco, and that is what the Commonwealth desired to prove to you." [2211]

Mr. Katzmänn now took up the prosecution's witnesses in a discussion which will be referred to in Part II, Chapter I of the present volume. Another interruption took place when he charged that Fay and Kurlansky were discredited because although they claimed they had volunteered after reading Mrs. Andrews' testimony, the defense had shown earlier knowledge of them, counsel having asked Mrs. Andrews whether she knew them. Mr. McAnarney refuted this argument by calling attention to the fact that Mrs. Andrews had twice testified, first on a Saturday, then on a Tuesday, and that the men had volunteered after the Saturday and that counsel had questioned her about them on the Tuesday. This correction Mr. Katzmänn accepted in the following way:

"MR. KATZMANN. I always, Brother McAnarney, acknowledge the truth from any source.

MR. JEREMIAH MCANARNEY. Well, I would like it from me.

MR. KATZMANN. Including you when you read from the record, sir.

MR. JEREMIAH MCANARNEY. Thank you.

MR. KATZMANN. And if that is the record, I accept it. Whatever may be the fact as to when she testified, I said it was in cross-examination, and it was in cross-examination, and if it was after he was visited by Fay and by Kurlansky, when that part of my argument you should disregard, that it was before either one of them had seen them. I knew it was in cross-examination, because I took it from my own notes, and that is all I knew. Lola Andrews' testimony, gentlemen, still stand." [2222]

There was a third interruption when Mr. Katzmänn stated that Bostock had testified to having seen in Berardelli's possession on the Saturday before the shooting the gun which had been taken to Iver Johnson's for repairs.

"MR. MOORE. I beg your pardon, just one second. My recollection of the evidence is Bostock did not identify this gun. He said he saw simply a bright nickel gun. He made no effort to identify either as to calibre or as to make.

THE COURT. Gentlemen, you remember what the evidence is. You will, of course, apply it according to your remembrance of the evidence.

MR. KATZMANN. I say to you, gentlemen, my recollection of the evidence of Bostock in that particular is that he said the first time he ever saw the gun was Mr. Berardelli permitted him or he had it from Berardelli in his hand, and that the gun we produced was similar and answered the description of the gun and that he saw a gun in the possession of Berardelli on the

Saturday before his death. Contrast that with the testimony of Mrs. Florence." [2231]

On the subject of Vanzetti's revolver Mr. Katzmunn noted the failure of Orciani to testify. This comment he followed up in a manner which brought Mr. Moore to his feet in objection:

"And is there any significance, gentlemen, in the fact that Falzini, the East Boston man last October, to whom Orciani, the elusive Orciani who has not been produced, is alleged to have sold it after buying it from a man in Norwood. Falzini says 'that was a six-cylinder gun I had,' and this revolver is a five cylinder. Is there any significance to the fact, gentlemen, that Vanzetti himself, when he was in the Brockton police station said it was a six-cylinder revolver? What does that mean, gentlemen?

"Who knows best, referring to that same revolver, whether there is a new hammer in it or not, the man who says he put a new hammer in some [2229] time after the 20th day of March, 1920 on the job ticket corresponding to the one downstairs—to be sure the man upstairs had it 32 when the ticket downstairs showed that it was a 38—or the man who came from,—Lincoln Wardsworth, who came from New Hampshire and Mr. Clark at Iver-Johnson said he made the entry and it was 38. When it was upstairs it was confused but it was the same ticket shop number, and Lincoln Wardsworth said it was 38. And Mr. Fitzmyer the gunsmith upstairs for 31 or 41 years, he said it was a new hammer put in that gun. Who knows more about it, the man who put the hammer in or James E. Burns; an expert user of fire arms, a gunsmith for 41 years, or an expert who never saw the gun until he came into the court room? . . . [2230]

"Why didn't you bring Orciani into this court room and why didn't you permit Orciani to testify, the man who could explain about this profound reason for the consciousness of guilt if that reason existed in him? He has been within the control of this defense. He had been outside the court room, as witnesses have testified, and he is not produced. What is the reason?

"The Commonwealth has a right to draw the inference that if produced he would give testimony that is not helpful to the defendants. And I make that comment and I ask you to draw that inference that Ricardo Orciani was not produced because if produced his testimony would be against the interests of the defendants.

"MR. MOORE. At this time the defendants desire to object to the last line of argument with reference to calling this witness and take an exception.

THE COURT. If you want an exception before I rule?

MR. MOORE. No, your Honor.

THE COURT. I think it would be well to let the Court rule before you claim an exception. I will hear you at the desk, Mr. Moore.

[Conference at bench between Court and counsel.]

MR. MOORE. I stand on the objection, your Honor.

THE COURT. I will allow it to stand." [2233]

Before the second reference to Orciani Mr. Katzmunn answered Mr. Moore's argument that no one had been produced to identify Sacco who had known him when he worked at Rice & Hutchins' in 1918, saying:

"Well, will you tell me if, in addition to the other things that a district attorney is expected to possess he is supposed to possess the power of clairvoyance to read months in advance of the trial that the man had given a fictitious name and that he was then to go and look it up. Be reasonable, gentlemen, in your arguments. We did not know that he ever worked at Rice & Hutchins. He denied it and when he told us on the stand that he worked there we found that he worked under a different name, Musmarotelli, for seven or eight days in October, 1918. If that was such a wise thing to have happen, either for or against Sacco, why didn't you bring him"? [2233]

Another interruption took place while Mr. Katzmann was talking about the letter Sacco said he had shown his employer, Kelley, there having been some question as to whether that was the original letter announcing the death of Sacco's mother, or the letter of April 12th which the jury had heard. Mr. Katzmann claimed it was the latter, Mr. McAnarney, the former. Answering the interruption Mr. Katzmann said:

"I am not without some physical tiredness, but my recollection is still working 100 per cent, gentlemen, even though it is the close of a very long, very hot and very difficult argument to make, and I say to you that when I said that on the stand George Kelley was shown a letter dated 12th I meant that upon a fair summary of all the evidence, because you will recall in cross examination of the defendant Nicola Sacco I asked him what was the matter with the black bordered letter that was in the possession of the defendants' counsel and he said the trouble with it it was too late. Now, it isn't fair inference to him to refer to the letter he showed George Kelley then I regret to have made that statement." [2234]

After ridiculing Andrower's claim that he could remember the date on which Sacco had been at the consulate¹ Mr. Katzmann concluded his summation with the following words:

"A jury must decide the facts judicially. The question of where the truth lies here is a cold proposition of fact that is to be decided without any regard to those who may be deprived of a husband and a father by your decision. If you were to bring about a miscarriage of justice—and I know you won't—because you would allow feelings of sympathy to sway you from a just verdict, you would have failed in the administration of the law, and indeed the law itself would have failed. You are now between the verdict the most important cog in the wheels and machinery of justice, and if you fail to function properly the whole machine and public justice stops and is not administered properly.

"Leave any consideration of sympathy for Mrs. Berardelli or sympathy for Mrs. Parmenter out of the case. Leave any sympathy for Mrs. Sacco or her boy out of this case. If her husband is guilty and the Commonwealth has proven it, he did not have sympathy for Mrs. Berardelli and Mrs. Parmenter, and he should have none extended to him.

"The question is one of fact, gentlemen, arrived at under the rules of law. It has been said to you that your decision will take away the lives [2236] of two men if it be that of guilty. Well, gentlemen, that is not so

¹ See p. 487.

in one sense. You are not taking away the lives of the defendants by finding them guilty of a murder of which they are guilty. The law takes their lives away and not you. It is for you to say if they are guilty and you are done. You pronounce no sentence of death. Does the physician who is called in to a patient who is dying and who administers all the skill that he possesses to seek a recovery and if the malady with which the patient is afflicted is fatal and that patient die, has the physician taken her life? You are the consultants here, gentlemen, the twelve of you, and the parties come to you and ask you to find what the truth is on the two issues of guilt or innocence. Gentlemen of the jury, do your duty. Do it like men. Stand together you men of Norfolk!" [2237]

At the conclusion of the summation Bostock's cross-examination about the gun was read. With it there came the statement that Mr. Katzmann agreed "that Mr. Bostock did testify that he saw Mr. Berardelli with a gun in his hands on the Saturday before, but that there is no testimony identifying this gun in question here as the gun that Bostock saw." [2237]

On the last day of the trial, July 14th, 1921, the motion for a separate trial for Vanzetti was renewed. A motion was made for a directed verdict on the ground that in his summation the District Attorney had admitted that Vanzetti had not been driving the murder car, an admission made in partial repudiation of Levangie's testimony. Mr. Moore also made a motion for a verdict of not guilty on behalf of Sacco. Bostock's testimony about the gun was again read.

e. *The Charge*

Judge Thayer, from the bench on which stood three large bouquets of flowers, one the gift of Sheriff Samuel Capen, charged the jury:

"Mr. Foreman and gentlemen of the jury—you may remain seated—the Commonwealth of Massachusetts called upon you to render a most important service. Although you knew that such service would be arduous, painful and tiresome, yet you, like the true soldier, responded to that call in the spirit of supreme American loyalty. There is no better word in the English language than 'loyalty.' For he who is loyal to God, to country, to his state and to his fellowmen, represents the highest and noblest type of true American citizenship, than which there is none grander in the entire world. You gentlemen have been put to the real test, and you have proven to the world, and particularly to the people of Norfolk County, that you truly represent such citizenship. For this loyalty, gentlemen, and for this magnificent service that you have rendered to your State and to your fellow men, I desire, however, in behalf of both to extend to each of you their profoundest thanks, gratitude and appreciation. [2239] . . .

"Let me repeat to you what I said to another jury in a similar case: Let your eyes be blinded to every ray of sympathy or prejudice but let them ever be willing to receive the beautiful sunshine of truth, of reason and sound judgment, and let your ears be deaf to every sound of public opinion or public clamor, if there be any, either in favor of or against these defendants. Let them always be listening for the sweet voices of conscience

and of sacred and solemn duty efficiently and fearlessly performed. The law grants to every person the same rights and privileges, and imposes upon each corresponding duties, obligations and responsibilities; for whoever is willing to accept the blessings of government should be perfectly willing to serve with fidelity that same government. In the administration of our laws, criminal or civil, there is and should be no distinction between parties. For if it ever should so appear in some cases, this, gentlemen, is not the fault of the integrity of the law but rather due to the weakness of human beings in the administration of the law. Therefore, under our law, all classes of society, the poor and the rich, the learned and the ignorant, the most powerful citizen as well as the most humble, the believer as well as the unbeliever, the radical as well as the conservative, the foreign-born as well as the native-born, are entitled to and should receive in all trials under our laws the same rights, privileges and consideration as the logic of law, reason, sound judgment, justice and common sense demand. I therefore beseech you not to allow the fact that the defendants are Italians to influence or prejudice you in the least degree. They are entitled, under the law, to the same rights and considerations as though their ancestors came over in the Mayflower.

"Guilt or innocence, gentlemen, of crime, do not depend upon the place of one's birth; neither should the place of one's birth, the proportion of his wealth, his station in life, social or political, or his views on public questions, prevent an honest judgment and impartial administration and enforcement of the law, for when the time comes that these conditions exist to an extent that men, because of these conditions, cannot be indicted, tried, acquitted or convicted according to the laws of the Commonwealth in a court of justice, the doors to our court houses should then be closed [2241] and we should announce to the world the impotency of our courts and the utter failure of constitutional or organized government." [2242]

A substantial part of the charge was devoted to a discussion of reasonable doubt, conspiracy and the various degrees of murder. The rest of it follows in full:

"The Commonwealth claims that these defendants were two of a party of five who killed the deceased. The defendants deny it. What is the fact? As I have told you, the Commonwealth must satisfy you of that fact beyond reasonable doubt. The defendants are under no obligation to satisfy you who did commit the murders, but the Commonwealth must satisfy you beyond reasonable doubt that these defendants did. If the Commonwealth has failed to so satisfy you, that is the end of these cases, and you will return verdicts of not guilty. This is so because the identity of the defendants is one of the essential facts to be established by the Commonwealth. On the other hand, if the Commonwealth has so satisfied you, you will return a verdict of guilty against both defendants or either of them that you so find to be guilty.

"Identity, gentlemen, may be established by direct or by circumstantial evidence or by both. Direct evidence is evidence of personal observation by the witness of the criminal act itself. Circumstantial evidence depends upon the proof of circumstances or facts from which the ultimate fact or the crime itself is inferred. It has been said that circumstantial evidence alone should never be sufficient to establish the guilt of any defend[2251]dant in

any criminal case. Such a statement, gentlemen, is the result of ignorance rather than sound reason or mature judgment, for it has been truly said that crime would go unpunished to a very large extent without the aid of circumstantial evidence. Both kinds of testimony, gentlemen, may be at times irresistibly strong and at other times irresistibly weak. Therefore, each case must stand by itself. It is not the name, gentlemen, that you give to the evidence which should govern your conclusion, but rather it is the quality, the character and the probative effect of such evidence independent of the name ascribed to it. Direct evidence from witnesses who are not believed is exceedingly weak. Evidence of facts and circumstances from witnesses who are not believed is exceedingly weak. Direct evidence from witnesses who are believed is irresistibly strong; and evidence of facts and circumstances from witnesses who are believed when such evidence forces the mind, as a reasonable mind, to the conclusion of guilt, is irresistibly strong.

"Therefore, in the eyes of the law there is no important distinction between circumstantial evidence and any other kind of evidence. It is the degree of proof that the evidence establishes; for, no matter what the evidence may be, it is necessary that that evidence should satisfy you of the guilt of these defendants so that you cannot come to any other reasonable conclusion than that they are guilty. If such evidence, on the other hand, does not so satisfy you it is of no consequence, gentlemen, then whether it is evidence of circumstances or evidence of eye witnesses, so that you must see, gentlemen, the real question is whether or not from all the evidence in these cases, no matter what you may call the name of the evidence, the Commonwealth has satisfied you to a reasonable and moral certainty that these defendants committed the alleged murder. If it has, the defendants are guilty. If it has not satisfied you, then they are not guilty.

"As a general rule, the ordinary witness cannot testify to his opinions on questions at issue. He is restricted to evidence that tends to prove facts. To that rule of law there are certain exceptions. One of them includes identification. This being true, the ordinary witness can express his opinion as to the identity of persons and things provided such opinion is based upon personal observation. Therefore, identity becomes an essential fact in these cases that must be proven by evidence, and any evidence that tends to establish such fact is admissible. The law does not require that evidence shall be positive or certain in order to be competent. Over-positiveness in identification might under some circumstances and conditions be evidence of weakness in the testimony, rather than strength. Certainty varies, gentlemen, in degrees. It ranges from the most positive to the slightest degree. Therefore, any evidence that comes within those degrees is competent for the consideration of the jury. Expressed somewhat differently, any evidence that tends in any degree, however slight, to prove a likeness or similarity between the defendants and the assailants [2252] is admissible. The weight or probative effect of such evidence rests exclusively with the jury.

"Therefore, it becomes your sole duty to determine this fact of identity, as well as all other facts involved in these cases, for the Court has absolutely nothing to do with the facts. The Court determines the law, and has no opinion on the facts. The jury must determine the facts without suggestion or intimation from the Court either by speech, gesture, tone of voice or in any manner whatsoever. The law, therefore, places this important responsibility

upon you and you must assume it as men of sound judgment, common sense and clear conscience, without fear, sympathy or prejudice.

"Upon the question of identity, the Commonwealth relies upon two kinds of evidence, direct and circumstantial. The direct evidence came from eye witnesses who have testified that they saw the alleged shooting, and from others who claim that they saw one or both of the defendants while escaping in the so-called death automobile. Evidence has been offered by both sides. On the one side it is affirmative and the other it is negative.

"Now, how are you going to determine wherein lies the truth? You must use your best judgment and common sense, your knowledge of human beings and human conduct, your ability to dissect and analyze evidence so that you can separate truth from falsehood and actualities from things imaginary. You should carry also in your minds the fairness and impartiality of each of the witnesses upon both sides, their desire and willingness to tell the truth, their interest, if any, in these cases, their power of vision, their freedom from nervous strain or excitement, their bias or prejudice, their opportunities for observation, the duration of such observation, their reasons for making such observations, and their intellectual qualifications which would enable them to actually and reliably reproduce for your consideration what, in fact and in truth, they did or they did not see.

Therefore, you might naturally say the most important things that would assist you in determining this question of personal identity by direct evidence would be, first, the intelligence of the witnesses who made the observation, their opportunity for observations, their reasons for making such observations, the duration of such observation and the mental or nervous condition of the witness at the time of making such observations, for you must remember that the witnesses have attempted to reproduce before you what in fact they saw at the time of and immediately following the alleged homicide.

"Therefore, gentlemen, you might say, if you wished, that the most important qualification of the witness that would enable him to present to you a true reproduction of his observation would depend upon his intellectual keenness and the strength of his mentality. For the photographer, in order to take a true likeness of an individual, must have a proper physical equipment. So, too, a witness must have a proper intellectual equipment in order to take a true mental picture of an individual. [2253] Of course, coupled with this equipment, either physical or intellectual, the person taking the picture should have a reasonable opportunity so to do. So you see, gentlemen, the question is, whether or not true mental photographs or pictures of these defendants, or either of them, were taken by the witnesses or any of them at the time of the alleged homicide immediately following the same so that they have reproduced correctly such photographs or pictures in your presence and for your consideration.

"I have charged you at considerable length upon this fact of personal identification of the defendants by direct evidence. You must bear in mind, however, that there is other evidence that bears upon this question. The Commonwealth and the defendants, both, make this claim. This is so because personal identification by witnesses is only one link in the chain of evidence to which you must give full consideration. One piece of testimony standing alone by itself may be weak or strong. Another piece of testimony

separated from all the rest may be weak or strong, but you must consider the evidence in its entirety, for the real test is this: Whether or not you are satisfied to a reasonable and moral certainty from all the evidence introduced on both sides that the defendants, or either of them, were at South Braintree on the day in question. This evidence applies not only to the affirmative testimony of the Commonwealth which tended to prove the presence of the defendants at South Braintree at the time when said homicides were committed, but also to the negative testimony introduced by the defendants which tended to prove their absence.

"For instance, the defendants claim you must consider with care the evidence tending to prove an alibi, for the reason that, if they were elsewhere when the alleged homicides were committed, that is evidence which tends to corroborate the witnesses of the defendants to the effect that they were neither at the place when the alleged homicides were committed, nor were they in the bandit car. In regard to the evidence of an alibi, I shall consider that matter more in detail later.

"Now, the Commonwealth claims that there are several distinct pieces of testimony that must be considered upon the question of personal identification. Let us see what they are. First, that the fatal Winchester bullet, marked Exhibit 3, which killed Berardelli, was fired through the barrel of the Colt automatic pistol found upon the defendant Sacco at the time of his arrest. If that is true, that is evidence tending to corroborate the testimony of the witnesses of the Commonwealth that the defendant Sacco was at South Braintree on the 15th day of April, 1920, and it was his pistol that fired the bullet that caused the death of Berardelli. To this effect the Commonwealth introduced the testimony of two witnesses, Messrs. Proctor and Van Amburg. And on the other hand, the defendants offered testimony of two experts, Messrs. Burns and Fitzgerald, to the effect that the Sacco pistol did not fire the bullet that caused the death of Berardelli.

"Now, gentlemen, what is the fact, for you must determine this question of fact, and when determined it may be of assistance to you in determining the ultimate fact. Of course, this evidence cannot be considered by you in any manner whatsoever against the defendant Vanzetti unless you find as a fact that he, too, was present aiding and assisting Sacco and the other conspirators in the shooting and killing of Berardelli. Although I have referred only to the killing of Berardelli, you must bear in mind there is no claim but that the same persons who are responsible for the death of Berardelli are equally responsible for the death of Parmenter. This is so, because, as I have told you, both of the deceased were killed at practically the same time by the same joint principals or conspirators and were actuated by the same motives and purposes.

"Second, that the deceased Berardelli had a revolver, that immediately following his death none was found in his clothing, that Berardelli about three weeks before his death, in company with his wife, left said revolver with the Iver Johnson Company of Boston for the purpose of having a new spring put into it, that according to the foreman of the repair shop of Iver Johnson Company a new spring and hammer were put into an H. & R. revolver that had a repair tag number upon it of 94765, which number was given to the repair job by the person who took the revolver from Berardelli at the time it was left to be repaired; that on the Saturday night previous

to the shooting some witness testified that a revolver in the hands of Berardelli,—he saw in the hands of Berardelli, was something similar to the one he had previously seen with Berardelli.

"Now, the Commonwealth claims that if this revolver, found or taken from the defendant Vanzetti, was taken by him at the time of the killing of Berardelli, that is evidence tending to corroborate the witnesses of the Commonwealth that the defendant Vanzetti was in the bandit car and, therefore, was present at the time of the alleged shooting at South Braintree. You must therefore see that the new hammer and spring may become a very important feature in the identity of this revolver.

"I have stated to you the claim of the Commonwealth with reference to this Harrington & Richardson revolver. You must remember now, on the other hand, the defendants have offered testimony tending to prove that said revolver never was the property of Berardelli, but, having passed through several hands, it became the property of the defendant Vanzetti, and that, according to the testimony of the two experts, the said Messrs. Burns and Fitzgerald, no new spring and hammer were put into said revolver by the employees of said Iver Johnson Company.

"Here again, gentlemen, is another controverted question of fact which you must determine. What is the truth? For the truth will assist you in arriving at a conclusion. Of course, this evidence is not competent against the defendant Sacco, because there is no suggestion that the Berardelli revolver was used by either of the so-called bandits in causing the death of either Berardelli or Parmenter. Therefore, this evidence must be limited in its probative effect, if it has any, to Vanzetti alone.

"Third, that there is evidence tending to prove that a cap was found [2255] near the body of Berardelli; that said cap was in general appearance and color like that worn by the defendant Sacco; and that the defendant Sacco was seen going away without any cap upon his head. Now, the Commonwealth claims that if this cap belonged to Sacco it could not have been found near the dead body of Berardelli unless the defendant Sacco lost it at the time of said shooting. If, then, he lost it at that time, you have a right to say that he was then present.

"On the other hand, you should remember that the defendant Sacco and his wife both have testified that said cap never belonged to the defendant, and that he never owned it, and if that is true, it should not be considered by you as evidence against him. Again, gentlemen, you have another controverted question of fact. What is the truth? Having ascertained that, apply it accordingly. Of course, this evidence cannot be considered as competent evidence in any way against the defendant Vanzetti.

"There is another piece of testimony to which I specifically call your attention, because the Commonwealth claims that such testimony tends to prove, and in fact proves, a consciousness of guilt on the part of these defendants. You must therefore follow me with great care while I explain to you the legal meaning of this expression so that you may apply correctly the law to the facts found by you to have been established; for, you must notice that I said, 'to established facts.' This is so because facts must be established in order to make application of this principle of law. In these cases on trial, if the evidence does not establish facts from which guilt of the crime alleged in these indictments may be inferred, then you

will eliminate entirely from your consideration such evidence, because there are no facts proven to which you can apply this law of consciousness of guilt.

"The entire record, gentlemen, of every person's life is safely locked up in the vault of the human brain. No human eye has ever scanned a line of that record, and no human intelligence has ever seen that brain in action, and although we know this to be true, yet we also know at the same time that this same brain directs and controls all actions of the human body and its members. Therefore, the mind is the mental pilot in command and the body obeys. The body, without the mind, is like the vessel at sea without its rudder, or the automobile without its steering wheel and without which both would be helpless and without control.

"If, then, the mind directs and controls the movements of the body, and if it is safely protected from human view from without, how, then, can the jury ascertain the real facts and purposes of such mind within? My answer is, by a true interpretation of the external bodily signs and manifestations that appear from without, just as the mind of the deaf and the dumb is interpreted by the movement of the finger tips from without. In other words, speech, physical acts, movements and manifestations of the body and its members translate into human language the thoughts, in[2256]tentions, knowledge and even the secrets of the mind within. As the speedometer automatically records mile after mile as the automobile proceeds on its journey, so the human brain records every act by the human body and its members pursuant to its direction, whether such act be lawful or unlawful, guilty or innocent.

"Therefore, the mind being conscious of every bodily act theretofore committed, it knows whether or not such act is one of innocence or guilt. If it indicates guilt, that is evidence of consciousness of a guilty act, and evidence of a consciousness of a guilty act is evidence tending to prove commission of such guilty act, and evidence of the commission of a criminal act tends to prove the identity of the author of such criminal act. To be more specific, the real question is, do the actions, conduct and speech of the defendants on the night of May 5, 1920, and at other times, indicate that their minds were then conscious of having committed some crime? If they do, then the probative effect of such consciousness must be determined by the jury.

"You must remember, however, gentlemen, what I have already told you, that consciousness of guilt depends upon proof of established facts. Therefore, if the Commonwealth has satisfied you of such established facts from which you find a consciousness of guilt on the part of these defendants, or either of them, then you may consider such facts in connection with all the other facts established, if any, as bearing upon their guilt of the crimes set forth in these indictments, which allegation is murder.

"This being true, if then, the defendants were only consciously guilty of being slackers, liable to be deported, fearing punishment therefor, and were not consciously guilty of the murder of Berardelli and Parmenter, then there is no consciousness of guilt during the time they were at the Johnson home, because the defendants are solely being tried for the murders of Berardelli and Parmenter, and for nothing else. In addition to what I said as to the consciousness of guilt of these defendants in regard to their conduct and movements while at the Johnson house, it equally applies to all the

other evidence of consciousness of guilt in these cases for the same reason that I have given you, namely, that these defendants are being tried for the murders of Berardelli and Parmenter, and for nothing else. For the law requires that there must be a causal connection or some probative relationship between the evidence tending to prove a consciousness of guilt and the crime charged in the indictments.

"But the Commonwealth claims that all the evidence of the declarations conduct and movements of the defendants while at the Johnson house, at subsequent times thereto and on subsequent occasions, tends to prove a consciousness of guilt of the murders of Berardelli and Parmenter. This is on the ground that the evidence is consistent only with the consciousness of having committed the crime of murder and inconsistent with any other theory. While, on the other hand, the defendants claim that if [2257] there was any consciousness of guilt at all it did not refer to the murders of Berardelli and Parmenter but to some punishment that they or their friends might receive for being slackers, which might include deportation, as well as some other form of punishment.

"So you see, gentlemen, here is another controverted question of fact which you must determine. Now, gentlemen, on this question, again, what is the truth?

"Now, let me state to you the salient parts of the testimony that may have some bearing upon this question of consciousness of guilt, in order that you may understand and more intelligently apply the principles of the law upon this subject to the facts found by you to have been established. There seems to be no dispute about some matters as to what took place on the night of May 5, 1920, at the Johnson house. It is admitted that Sacco and Vanzetti, Orciani and Boda were at or near the Johnson house on that night at about 9:20 P. M.; that the two defendants were arrested on an electric car while returning from West Bridgewater to Brockton; that while in said car a Harrington & Richardson revolver of 38 calibre, loaded with five bullets, was taken from the defendant Vanzetti; that a Colt automatic pistol, fully loaded, of 32 calibre, together with 32 bullets, was taken at the Brockton police station from the person of the defendant Sacco. When I say '32 bullets,' if I recall the testimony, that includes not only the loose bullets in the pocket together with the cartridges that were in the pistol at that time.

"As to what actually took place at the Johnson house, in the electric car, and at the Brockton police station, the parties are at great variance. At the time Mrs. Johnson went over to the Bartlett house, a distance of about 60 feet from her house, did the defendants follow her? Did they remain outside for about ten minutes while she was inside the Bartlett house, telephoning the West Bridgewater police? While Mrs. Johnson was in the house, did she see the light of a motorcycle flashing back and forth on one side and on the other? If she saw this, what was its purpose? Were there telephone wires connected with the Bartlett house that could be seen from the street? Were the defendants conscious of or suspicious of what Mrs. Johnson was doing in the Bartlett house? Did that consciousness have anything to do with their departure? The Commonwealth claims it did.

"The defendants say first, that they did not follow Mrs. Johnson over to the Bartlett house and, secondly, that they left without taking

the Overland automobile because there were no number plates on it.

"Now, what is the truth? There again you see, gentlemen, there is a direct conflict between the parties. The Commonwealth claims that they left because of a consciousness of what happened at the Bartlett place. The defendants say no, they left because there were no number plates which they could put upon the Overland car and therefore they left it intending to return for it the next morning. [2258]

"Now, then, the question you must determine is this: Did the defendants, in company with Orciani and Boda, leave the Johnson house because the automobile had no 1920 number plate on it, or, because they were conscious of or became suspicious of what Mrs. Johnson did in the Bartlett house? If they left because they had no 1920 number plates upon the automobile, then you may say there was no consciousness of guilt in consequence of their sudden departure, but if they left because they were consciously guilty of what was being done by Mrs. Johnson in the Bartlett house, then you may say that is evidence tending to prove consciousness of guilt on their part.

"But still, you must remember that such consciousness of guilt, if you find such consciousness of guilt, must relate to the murders of Berardelli and Parmenter and not to the fact that they and their friends were slackers and liable to be deported therefor or were even afraid that some kind of punishment might come to them.

"So you see, gentlemen, here is another question of fact. They are directly opposite to each other, and you must determine what is the fact. You must find in your mind what was the fact on that night, because you must apply the law only to facts known to exist. The law should never be found,—should be applied only to facts that are true, and therefore, here before you can apply this principle of the law as to what took place upon that occasion, you must first determine the facts, because the parties are at great variance upon this question.

"The next question that you might consider would be what actually took place in the electric car and the automobile when the defendants were arrested and immediately following after that. Is the testimony of Officer Connolly true, in that Vanzetti put his hand in his hip pocket? Did Officer Connolly say to Vanzetti, 'You keep your hands out on your lap or you will be sorry'? Did his fellow-officer, Mr. Spear, hear Officer Connolly make this statement to Vanzetti? This is a question of fact you must again determine. The court admitted this testimony of Officer Spear, not for the purpose of proving that Vanzetti put his hand in his hip pocket, but simply for the purpose of corroborating Officer Connolly to the effect that he heard said Connolly make the statement.

"Now, you have a right to say that this is a very important question that you must determine. Its importance, as I have told you, depends upon what you find the fact to be. The Commonwealth claims that the defendant Vanzetti put his hand in his hip pocket for the purpose of using a revolver upon the arresting officer in order that he or both he and Sacco might escape.

"The defendants have testified that nothing of that kind happened. Again, what is the truth? If the defendant Vanzetti intended to do violence to the arresting officers or either of them if it had not been for the command of Officer Connolly, from this evidence you may find consciousness of guilt on the part of the defendant Vanzetti, but not against Sacco; and [2259]

if you find that Vanzetti did so intend to use his revolver, that is evidence tending to prove self-consciousness of guilt of some crime committed by him. If it proves such self-consciousness, then you will naturally ascertain the nature, character and gravity of the crime committed. If a person is willing to use a deadly weapon such as a revolver upon an arresting officer in order to gain his liberty, you have a right to ask what would naturally be the nature, character and gravity of the crime committed. But you must bear in mind, as I have told you, that Vanzetti and Sacco both have testified that nothing of the kind happened in the electric car or at any time, so far as the defendant Vanzetti is concerned. If there was on the part of Vanzetti no intention or thought of using a revolver upon either of the arresting officers then, of course, you will find from this evidence no consciousness of guilt of that fact.

"I might say, further, it is not sufficient that the Officer Connolly thought either of the defendants were to draw a revolver by the manifestations made. The real question is as to the mental state of either and both defendants Vanzetti and Sacco at that time. Did either of them or both of them, as has been testified, have in their minds the desire and the purpose and intention of drawing and using a revolver upon either of the arresting officers? You heard the testimony of the officers. You heard what they said. You heard about the manifestations and actions of the members of the body, to wit, the arms. The question is, first, did either Vanzetti or Sacco make such movements? The defendants deny it. If they did make such movement, did they, the two defendants, or either of them, intend by what they did to use their revolvers, or did they make the movement for the purpose of reaching for their revolvers for the purpose of protecting themselves against the officers? Now, gentlemen, again there is a question of fact and you must draw such conclusions if any, that should be drawn from the fact that you find to have been established.

"I will not dwell further upon the testimony with reference to the defendant Sacco. A simple statement of the law with reference to the defendant Vanzetti applies to Sacco. What was on Sacco's mind at that time? Did he make one movement or two movements toward the front of his body? Did he make such manifestations? He denies it? And if he did, what did he have in mind at that time; not what the officer had in mind. What did Sacco have in his mind? Did he make that movement? Did he make, did he reach toward his pocket or toward the front of his clothing? Did he do that? If he did it, what was then Sacco's mind? Did he reach for the purpose of getting a revolver or pistol? If he did, then you have a right to say whether or not that was consciousness or evidence of consciousness of guilt so far as the killing of Berardelli and Parmenter is concerned. And this evidence, of course, against the defendant Sacco cannot be considered in any way against the defendant Vanzetti.

"There are two pieces of testimony to which I shall call your attention. One is the testimony of Chief Stewart, as to a conversation between him [2260] and the two defendants immediately following the arrest; and the other is the statement of both defendants to District Attorney Katzmenn on May 6, 1920, at the Brockton police station. What I told you during the trial I now repeat: That the statements made by one of the defendants can be used only against him and not against the other. In other words,

the statements made by Vanzetti must relate to him alone and not to Sacco; and the statements made by Sacco must relate to him alone and not to Vanzetti.

"In the first place, gentlemen, let me say to you that the law protects persons who are under arrest from making any statement to police officers or to third persons. Therefore, under our laws silence by a person under arrest cannot be taken as an admission against him, although he may be questioned by a police officer or such third person, but if he sees fit to voluntarily talk and during such talk makes an admission, such admissions may be used against him at the trial. The officer is under no obligation, as a matter of law, to warn a person of his rights who is under arrest. The law does, however, require that such statement made by a defendant shall be voluntarily and freely made. That is, they should be made without coercion, threats, duress, intimidation, inducement, or offer or hope of reward.

"So the real test is that such statements or admissions shall be voluntarily made. This is so because the law says that such statements are presumed to be made voluntarily until evidence has been introduced to the contrary, although a defendant has not been even warned of his rights. In these cases, however, it is admitted that both defendants were informed by Chief Stewart and District Attorney Katzmman that they were under no obligation to talk. Therefore, if they did see fit to talk, whatever they said might be used against them if such statement were voluntarily made and such statements, whatever they were, can be used, as I have told you, only against the utterer, and against nobody else; and such statements that have been made, if they tend to prove a consciousness of guilt, such a consciousness of guilt must relate solely to the murders of Berardelli and Parmenter.

"I am not going to state even the salient part of these statements, partly because it would require too much time, but particularly because it is your duty to remember, to the best of your ability each and all of such statements. But the Commonwealth claims that many statements were made by each of these defendants to prove a consciousness of guilt and that such consciousness of guilt, in connection with other established facts, proves consciousness of guilt of the murders of Berardelli and Parmenter.

"Now, the law says that intentional false statements, deception and concealment of truth are evidences of consciousness of guilt and can be used against a defendant when, and only when, such consciousness relates to the crime charged in the indictment. That false statements were made by both of these defendants is admitted. This being true, you must deter[2261]mine their purpose, object and intent in making them. Did they know that Berardelli and Parmenter had been murdered? Did they realize and appreciate that they were being held in connection with these murders? Did they make false statements for the purpose of taking away suspicions from them of these murders? Did they knowingly make false statements as to their whereabouts on the day of the murders for the purpose of deceiving both Chief Stewart and District Attorney Katzmman and eventually for the ultimate purpose of establishing their innocence of the crimes charged? If you find those statements were false and known to be false by these defendants and were made by them for the purpose of deceiving both Chief Stewart and District Attorney Katzmman so that suspicion of the murders of Berardelli and Parmenter would be removed from them, then such false statements

made under such circumstances is evidence of consciousness of guilt against them.

"Now, in answer to this claim of the Commonwealth,—and I have only stated the claim of the Commonwealth,—the defendants say that although said statements were false, yet they were not made for the purpose of deceiving Chief Stewart or District Attorney Katzmman in regard to any fact whatsoever that had any relationship to the murders of Berardelli and Parmenter, because they said they had no knowledge whatsoever at that time of the murders of Berardelli and Parmenter. But they do, however, say that they made them to protect themselves and their friends from some kind of punishment, either by way of deportation because they were radicals, or because of their activities in the radical movement, or because of radical literature that they then had possession of.

"Again you have another controverted question of fact, the truth of which you must determine. If, then, such statements were made for the purpose of deception in regard to the facts relating to the murders of Berardelli and Parmenter, then you may consider such statements, as I have said before, as evidence of consciousness of guilt against them. If they were not made for such purpose or if they were made for any purpose whatsoever other than the concealment of the facts relating to such murders, then you will give the evidence no further consideration whatsoever.

"It would seem unnecessary and inadvisable for me to consider any further with you the evidence concerning any issue herein involved of which the Commonwealth has introduced affirmative testimony. All of the essential features I feel have been considered and covered so far as the law is concerned, but there remains for me to consider with you the defense of alibi that has been raised by these defendants. It is sometimes called a plea of not guilty, because as the defendants say in these cases that they were elsewhere at the time the alleged crimes were committed at South Braintree and therefore they could not have committed them. In other words, the defendants say it was physically impossible for them to have committed these crimes because at the very moment they were com[2262]mitted Vanzetti was in Plymouth and Sacco was in Boston—If you find such to be the fact, as it is purely a question of fact—then that would be a complete defense to these indictments and therefore you should return verdicts of not guilty.

"An alibi is always a question of fact. Therefore, all testimony which tends to show that the defendants were in another place at the time the murders were committed tends also to rebut the evidence that they were present at the time and place the murders were committed. If the evidence of an alibi rebuts evidence of the Commonwealth to such an extent that it leaves reasonable doubt in your minds as to the commission of the murders charged against these defendants, then you will return a verdict of not guilty.

"On the other hand, if you find that the defendants or either of them committed the murders and the Commonwealth has satisfied you of such fact beyond reasonable doubt from all the evidence in these cases, including the evidence of an alibi, then you will return a verdict of guilty against both defendants or against such defendants as you may find guilty of such murders.

"It is not my purpose to dwell longer upon any further consideration of the evidence in these cases. It would seem as though I have covered the most

salient parts that have relationship to the issues involved in the indictments. Of course, counsel with great ability and fairness have discussed all the evidence with you in great detail. It therefore becomes your duty to give due consideration and weight to every suggestion made by them on both sides that have any causal relationship to any issue involved in these indictments.

"If I have failed to present any claim made by either counsel, it is your duty to give the utmost consideration to every one of such claims made by them. This is so, gentlemen, because truth and justice cannot prevail without such consideration. For you should always bear in mind that the establishment of truth should be your object and your protection and justice always your shield; for when verdicts rest upon the solid foundation of truth and justice, the rights and protection of the people of Massachusetts are made secure.

"My duties, gentlemen, have now closed and yours begun. From this mass of testimony introduced you must determine the facts. The law, as I have told you, places the entire responsibility in your hands. I therefore call upon you to constantly bear in mind these parting words of the Court that here, in this temple of justice, before God and man, you made oath that you would 'well and truly try the issue between the Commonwealth and the defendants according to your evidence. So help you God.'

"I have now finished my charge. My duties are now at an end. I have tried to preside over the trial of these cases in a spirit of absolute fairness and impartiality to both sides. If I have failed in any respect you must not, gentlemen, in any manner fail in yours. I therefore now commit into [2263] your sacred keeping the decision of these cases. You will therefore take them with you into yonder jury room, the silent sanctuary where may the great Dispenser of Justice, wisdom and sound judgment preside over all your deliberations. Reflect long and well so that when you return your verdict shall stand forth before the world as your judgment of truth and justice. Gentlemen, be just and fear not. Let all the end thou aimest at be thy country's, thy God's and truth's." [2264]

After discussion with counsel in the absence of the jury Judge Thayer called to their attention that he had erred in speaking of a new hammer and spring as having been put into the Berardelli revolver, the fact being that it was only a new hammer. In regard to criticism made of the statement that Bostock had seen Berardelli on the Saturday before the shooting with a revolver similar to the one he had seen before, the Judge directed the jury's attention to the testimony which had been read that morning. He said, "you must be governed by what you say the evidence is."

Counsel for the defendants took no exception to any part of the charge nor did they make requests for additional instructions.

f. The Verdict

After the noon recess the exhibits were given to the jury, which then retired. A magnifying glass was later requested by the jurors and it was sent them. At about 7:30 in the evening the announcement came that the jury had arrived at a verdict. The record shows what transpired:

"THE COURT. Poll the jury, Mr. Clerk.

(The jury are polled and both defendants answer 'Present.')

THE COURT. If the jury is agreed, you may please take the verdict.

CLERK WORTHINGTON. Gentlemen of the jury, have you agreed upon your verdict? [2265]

THE FOREMAN. We have.

CLERK WORTHINGTON. Nicola Sacco.

DEFENDANT SACCO. Present.

(Defendant Sacco stands up.)

CLERK WORTHINGTON. Hold up your right hand. Mr. Foreman, look upon the prisoner. Prisoner, look upon the Foreman. What say you, Mr. Foreman, is the prisoner at the bar guilty or not guilty?

THE FOREMAN. Guilty.

CLERK WORTHINGTON. Guilty of murder?

THE FOREMAN. Murder.

CLERK WORTHINGTON. In the first degree.

THE FOREMAN. In the first degree.

CLERK WORTHINGTON. Upon each indictment?

THE FOREMAN. Yes, sir.

CLERK WORTHINGTON. Bartolomeo Vanzetti. Hold up your right hand. Look upon the Foreman. Mr. Foreman, look upon the prisoner. What say you, Mr. Foreman, is Bartolomeo guilty or not guilty of murder?

THE FOREMAN. Guilty.

CLERK WORTHINGTON. In the first degree, upon each indictment?

THE FOREMAN. In the first degree.

CLERK WORTHINGTON. Harken to your verdicts as the Court has recorded them. You, gentlemen, upon your oath, say that Nicola Sacco and Bartolomeo Vanzetti is each guilty of murder in the first degree upon each indictment. So say you, Mr. Foreman. So, gentlemen, you all say.

THE JURY. We do, we do, we do.

THE COURT. (To the jury.) I can add nothing to what I said this morning, gentlemen, except again to express to you the gratitude of the Commonwealth for the service that you have rendered. You may now go to your homes, from which you have been absent for nearly seven weeks. The Court will now adjourn.

DEFENDANT SACCO. They kill an innocent men. They kill two innocent men.

THE COURT. (After conferring with counsel.) The time is extended until whatever time he wants, to which extension the District Attorney gives his consent,—November 1st.

(The Court is adjourned.)" [2266]

III

THE MOTIONS AND THE APPEALS

- a. Motion for New Trial on the Minutes.
- b. The Ripley Motion.
- c. The Gould Motion.
- d. The Pelser Motion.
- e. The Goodridge Motion.
- f. The Andrews Motion.
- g. The Hamilton Motion.
- h. The Proctor Motion.
- i. The Appeal from the Conviction and from the Denial of the Motions.
- j. The Motion Based on the Medeiros Confession.
- k. The Appeal from the Denial of the Medeiros Motion.

a. Motion for new trial on the minutes

AFTER the rendition of the verdicts counsel for the defendants made a motion for a new trial on the ground that the verdicts were against the weight of evidence. This motion, of course, came on before Judge Thayer, as it was based solely on what had occurred at the trial. The Judge denied the same in an opinion handed down on December 24th, 1921.

The opinion of Judge Thayer reviewed some of the issues which had been tried, especially that of consciousness of guilt. He pointed out that under the decisions of the Massachusetts Supreme Judicial Court he had no right to interfere with the verdicts unless he could find that the jurors had been manifestly mistaken or that they had abused the trust reposed in them. He refused so to find after making the following observations about them:

"Twelve jurors were finally agreed upon, after the presiding justice had examined about six hundred and seventy-five. No jury was ever selected in a capital case with greater care, study and consideration. It was an intelligent jury. From the moment this jury was impanelled, they were excluded in every way from direct communication with the outside world. Their mail coming in and going out was duly censored, and it is a matter of satisfaction to announce that up to the present time, not one word of criticism has been made by counsel for the defendants against their honesty or integrity. The attack was aimed at their judgment, it being claimed that it was unduly warped by prejudice. On this account, I am asked to set aside these

verdicts; in other words, that I should so act [5547] because these twelve intelligent jurors did not properly weigh all the evidence, and therefore their verdict, on account of undue prejudice, was contrary to the weight of evidence." [5548]

The Judge next took up the question of Sacco's pistol and the mortal bullet. He pointed out that the solution of the question whether the bullet had been fired by that pistol depended on what could be observed from the exhibits and that this was a function not to be usurped by the Judge:

"The very conduct of the experts on both sides at the gun factory at Lowell which was first suggested by one of the experts for the defendants was an admission on their part that they recognized the important bearing the bullets removed from the pile of sawdust would have upon the question of whether or not the fatal bullet was fired through the Sacco pistol. Now, Capt. Van Amberg testified that in his judgment the bullet that killed Berardelli was fired through the Sacco pistol. Both experts for the defendants testified that in their judgment the fatal bullet was not fired through the Sacco pistol. In this state of evidence, the important question was raised of whether or not Sacco's pistol fired the bullet that killed Berardelli. . . . Now, days were spent upon the question of the relationship of the Sacco pistol to the bullet that killed Berardelli; and although the experts gave their opinions as to whether or not the fatal bullet was fired through the Sacco pistol, yet the jury were not dependent upon these opinions, because they had the benefit of personal observation, with the naked eye and by the use of magnifying glasses, of comparing the identifying marks on the fatal bullet with the marks upon the other bullets fired through the Sacco pistol. . . . [5551] When counsel on both sides asked the jurors to make these comparisons of identifying marks on the various bullets was it not a recognition on their part that these various identifying marks were disputed questions of fact which might according to the judgment of the jury go a long way in convicting or acquitting the defendant Sacco? This was obviously an important question of fact for the determination of the jury. . . . It is not for me to decide which experts should be believed, especially when the jury had the fullest opportunity of comparing with the naked eye and magnifying glasses in the court and jury rooms, the various identifying marks on the fatal bullet with those upon the bullets fired through the Sacco pistol. To determine this question correctly between the experts on both sides, it would depend upon what identifying marks the juror saw when making the comparison between the different bullets. This being true, it is not for me to decide what the jurors did or did not see with their own eyes." [5552]

About Sacco's cap Judge Thayer said:

"A cap was found near the dead body of Berardelli immediately following the murder. Eye witnesses for the Commonwealth testified that when Sacco went away from the scene of the murder in the 'bandit car' he was bare headed. Several witnesses for the defendants testified that although the man whom the eye witnesses for the Commonwealth testified was Sacco, was not in their judgment Sacco, yet the same person whoever he was was bare-

headed. Mrs. Berardelli testified that the said cap never belonged to her husband; that at the time of the murder he wore a dark, soft hat. One of the defendants' employers¹ testified that the cap in question in appearance and color looked like Sacco's cap and that he always hung it on a nail near the place where he worked; and that there were holes in the lining of the cap and that these holes, according to the claim of the Commonwealth were made by the nail upon which said cap was hung and that the cap fitted Sacco when he tried it on while upon the witness stand. As against this testimony both Sacco and his wife testified that the cap never belonged to Sacco and that Sacco claimed that the cap did not fit him and as evidence of the same tried it on while upon the stand. Here again is an important question of fact. What was the truth? Was it Sacco's cap? If it was, then that fact tended to corroborate the eye witnesses for the Commonwealth who testified that they saw Sacco in the 'Bandit car' immediately following the murder while escaping in said 'bandit car.' " [5555]

In connection with the charge of consciousness of guilt and the explanation offered by the defendants Judge Thayer discussed the lies they had told upon arrest. He referred to the portion of his charge in which he had advised the jury that radicals and the foreign-born were entitled to the same consideration as the native-born and concluded that he had no right to suppose the jury had violated these instructions.

The lies were also considered in connection with Sacco's alibi:

"The District Attorney did not claim but what Sacco had been at some time at the office of the Italian Consul, but did claim that he was not there on the afternoon of the day of the murder. In other words, he claimed before the jury that if Sacco was there on that day there was no legitimate excuse why he should lie about it. The fact that a man is a radical does not prevent a jury from ascertaining the causal relationship between the reasons given for telling the lie and the lie itself. If the reasons given are inconsistent with the lie itself, then the reasons may be discredited, especially when the lie refers to one's whereabouts on the day of an alleged murder. Now, it might be reasonable to inquire why he should fear the truth as to his whereabouts on that afternoon, and why should he be afraid of being deported to Italy if he told the truth to Mr. Katzmman and Chief Stewart, when he had in his pocket at the time of his arrest a passport for Italy upon which he of his own choice expected to sail two days following the night of his arrest for that country; and why fear these two public officers when they had nothing to do with the enforcement of the deportation or espionage laws? And again why should Sacco fear to tell these two officers that he had been to the Italian [5561] Consul's office, when they could have ascertained that fact from the passport that he had in his pocket? In other words if the defendant Sacco had told the truth that he was at the Italian consul's office on the afternoon of the day of the murder the Commonwealth claimed that no harm could have come to him because of that fact and if no harm could have come to him then the jury had a right to say that the reasons given for the falsehoods told were intentionally untrue and were therefore disbelieved, and if disbelieved the jury had a right to say that the

¹ Geo. Kelley.

'alibi' testimony failed because he could not and did not honestly and truthfully account for his whereabouts on the afternoon of the day of the murder." [5562]

He pointed out the advantage possessed by the jury over outside critics in that the jury had seen the witnesses and examined the exhibits:

"On the question of the weight of the evidence, the jury had the opportunity of observing and studying every witness upon the witness stand. This observation and study of witnesses had been recognized by all courts in every land as vitally important in ascertaining the truthfulness of witnesses. Yet there are persons who assume they can tell how a jury should decide a case upon evidence not one word of which have they ever heard or read; who can intelligently and correctly decide disputed questions of fact that have been submitted to a jury when their entire knowledge is dependent upon fragmentary accounts in newspapers; and who can unerringly decide that the bullet that killed Berardelli was not fired through the Sacco automatic pistol, when they never saw the fatal bullet and therefore have never made the slightest comparison of identifying marks on the fatal bullets and the other bullets fired through the Sacco gun." [5562]

The opinion concluded with the following comments:

"In conclusion let me say I have given these motions my best consideration. I have tried to follow the pathway of judicial duty and have never lost sight of the fact that the judge is governed by laws and should obey them to the same extent as should the individual. I cannot—as I must if I disturb these verdicts—announce to the world that these twelve jurors, violated the sanctity of their oaths, threw to the four winds of bias and prejudice their honor, judgment, reason and conscience, and thereby abused the solemn trust reposed in them by the law as well as by the Court. And all for what purpose? To take away the lives of two human beings created by their own God. The human frailties of man, his tender regard and love for human life and his profound sympathy for his fellowmen, when charged with the gravest offense known to the law, repudiates the suggestion. For it is a matter of common knowledge that these tender and human qualities, born in man, shrink from the very thought of the 'death penalty' until those human qualities have been controlled and overpowered by testimony which overwhelmingly and irresistibly forces a jury to the conclusion that the defendants are guilty.

"If I am in error in my judgment as to the sufficiency of the evidence to warrant a conviction or if I have committed any error at any time that might operate in any manner to the prejudice of either or both of these defendants the Supreme Judicial Court will make correction in due time; and if that Court shall find such error, nobody will welcome the correction more gladly than will I. But until that time comes, so far as these motions are concerned, the verdicts of the jury must stand. Therefore the motions for new trials in both cases for the reasons herein given are hereby denied." [5563]

From this decision no appeal was possible since the determination of the motion was wholly within the discretion of the trial judge; and no appeal was attempted.

b. The Ripley Motion

Already, on November 8th, before the denial of the motion just discussed, there had been filed the first of a series of other motions, called supplementary motions for a new trial.

It came to the notice of defendants' counsel that Ripley, the foreman of the jury, had had in his possession during the trial some 38 calibre cartridges like those found in Vanzetti's revolver, and that at least one of the other jurors had seen these. On October 7th, 1921, Mr. Jeremiah J. McAnarney had a conversation with Ripley in which the latter said there had been discussion among the jurors about these shells. On October 10th, before it was possible to procure an affidavit from him, Ripley suddenly died. Thereafter ten of the remaining jurors were interviewed by the defense. Most of them said they knew nothing about the shells; but two admitted having seen them, and one, that he had heard discussion about them. The basis of the motion was the impropriety of the jurors' considering anything not regularly an exhibit in the case.

In opposition to the motion the prosecution filed affidavits from all the jurors which did not differ materially from the statements they had made for the defense. The one juror not seen by the defense claimed he had observed in Ripley's possession a shell such as those described, but that the jury had not discussed it in connection with the case.

This motion, like all the subsequent "supplementary" motions, was not argued until October, 1923. Before then Albert H. Hamilton had been retained as firearms expert by the defense. He made an affidavit, used on this motion, in which he claimed that the Ripley shells showed marks indicating they had been pushed into the muzzle of Vanzetti's revolver. In a second affidavit he argued that certain ink marks on the Vanzetti cartridges had been placed there by the jurors while in the jury room, it being assumed the sheriff would not mark them while in his possession. There was still another affidavit in which an elaborate argument was developed about the respective ages of the Ripley and the Vanzetti cartridges in order to show that the jury might, from superficial indications, have formed false conclusions on the subject and have therefore failed to believe Vanzetti's testimony in regard to the time he purchased these cartridges.

All Hamilton's conclusions were disputed by the experts retained by the prosecution. In particular did they assert that it was impossible to determine the age of ink marks by any known tests.

It was in connection with some of these motions that William G. Thompson came into the case. It will be remembered that an effort had been made to have him replace Moore just after the trial began. Assisting Mr. Thompson was Mr. Arthur D. Hill, also of Boston. It was he who argued this Ripley motion before Judge Thayer.

Changes had taken place in the District Attorney's office. Mr. Winfield M. Wilbar replaced Mr. Katzmman and the case was now being handled by Mr. Wilbar's assistant, Mr. Dudley P. Ranney. In March, 1923, Mr.

Katzmann was appointed special assistant District Attorney to aid in preparing the opposition to some of the motions, and in September he was made an assistant Attorney General for the same purpose.

Just before the argument in October, 1923, an affidavit of a certain Daly was filed as the basis for a separate, but supplemental, Ripley motion. Daly, who had known Ripley well, swore that on May 31st, 1921, when Ripley had been on his way to serve as talesman, conversation about the case had taken place between them, that Daly had expressed doubt of the guilt of the defendants and that Ripley had answered: "Damn them, they ought to hang them anyway."

A whole year elapsed before the denial by Judge Thayer on October 1st, 1924, of this and all the other supplementary motions in separate opinions relating to each of them. The Judge disposed of the elaborate argument about the age of the bullets by pointing out that Vanzetti had testified some three weeks after the bullets had been shown the jury, so that it was unlikely that the latter would have paid any attention to the possible discrepancy between his testimony and the exhibits themselves. He made no comment on the possibility that Ripley may not have produced his shells until Vanzetti's testimony brought the matter again to the attention of the jury. He refused to find any misconduct on the part of the jury, saying:

"To believe that the jury carried in their mind these discolorations on the Vanzetti bullets. for the purpose of later discrediting the testimony of Vanzetti who did not testify until several weeks thereafter would seem to be altogether too fanciful, too decidedly ingenious, and not at all convincing. It is true that said Ripley did show, to two or three of the jurors, at some time before the jury retired to consider their verdict, said three cartridges, and that there was some talk or discussion about them (but not the Vanzetti cartridges) and what that talk or discussion was, whether favorable or unfavorable to the defendant, does not appear, or when it was, before the jury finally retired; none of the jurors could recall. If the jurors would not recall what that conversation was, bearing in mind the tremendous gravity of the issues involved, it would not seem as though it could be very material or important, and if not, I fail to see how it could, or might, have created any disturbing influence in the minds of the jurors against these defendants.

"I therefore find that the mere production of the Ripley cartridges and the talk or discussion about them did not create such disturbing or prejudicial influence that might in any way affect the verdict or operate in any way whatsoever to the prejudice of the defendants, or either of them. [3602] . . .

"At any rate, I am not willing to blacken the memory of Mr. Ripley and to pronounce those eleven surviving jurors as falsifiers under oath by claim of counsel that are so weak, so fragile, and so unsatisfactory; for it should be borne in mind that jurors, whose work is greater and whose responsibility under the law, is far more important than that of the presiding justice have rights that even he should honor and respect." [3603]

In conclusion the Judge said:

"Again, if this motion should be arbitrarily granted, it would mean that

every verdict would be unsafe if perchance one of the jurors should happen to be taken away. Still again, if this motion for a new trial based upon the hearsay statements made by a deceased juror to a counsel for the defendants under such circumstances as are herein disclosed, it would result in smirching the honor, integrity and good name of twelve honorable jurors, by a decision that never could be justified because it would not be 'controlled by either the sound principles of law' nor by the simplest rules of sound judgment, reason, truth, and common sense." [3604]

The Daly affidavit was not mentioned or referred to either in this decision or in any of the other opinions handed down on the same day.

c. *The Gould Motion*

Mr. Moore had been meanwhile occupied in seeking new evidence which might be of assistance to the defendants. Considerable sums of money were continuously being collected from sympathizers and expended on investigations of one sort and another. One line of inquiry pursued was the hunting up of possible additional eyewitnesses.

Even before the trial efforts had been made to find one Roy E. Gould, an itinerant peddler. His presence as an eyewitness had been noted in one of the newspapers on the day after the shooting, but no trace of him had been found by the defense. In October, 1921, he was discovered in Portland, Maine, by Burke, one of the witnesses for the defendants at the trial. Mr. Moore at once interviewed Gould and brought him to see Sacco in jail. In May, 1922, a second supplementary motion based on Gould's affidavit was made. Gould said that right after the shooting he had given his name and address to a police officer; and the officer admitted that Gould had done so and said that the information about him had been passed on to the State police.

Gould's story was that he had just reached Pearl Street when he heard shots and that he had gone out into the street at the railroad crossing and seen the automobile pass. A man had climbed from the back to the front of the car and had pointed a gun at him and fired it, sending a bullet through his overcoat. He described the man and said he was very different from Sacco and in no way like Vanzetti.¹ No attempt was made by the prosecution either to dispute any of Gould's statements, or in any way to discredit him.

In the opinion handed down by Judge Thayer in 1924 he said:

"The affiant never saw Sacco, according to his affidavit, from April 15, 1920, the day of the murder, until November 10, 1921, when he went to Dedham jail at the request of Mr. Moore. In other words, the affiant must have carried a correct mental photograph in his mind of Sacco for practically eighteen months, when he only had a glance in which to take this photograph on the day of the murder.

"To set aside a verdict on evidence of this character would be to deprive, in my judgment, the Commonwealth of its rights without reason or justification." [3513]

¹ His affidavit is discussed in Part II, Chapter I, pp. 316, 317.

Judge Thayer argued that this new evidence was merely cumulative and would not have affected the verdicts since it was not on the testimony of eyewitnesses that these rested.

"In the first place, this evidence only means the addition of one more eye witness to the passing of the bandit automobile. This, therefore, would simply mean one more piece of evidence of the same kind and directed to the same end, and in my judgment, would have no effect whatever upon the verdicts. For these verdicts did not rest, in my judgment, upon the testimony of the eyewitnesses, for the defendants, as it was, called more witnesses than the Commonwealth who testified that neither of the defendants were in the bandit car.

"The evidence that convicted these defendants was circumstantial and was evidence that is known in law as 'consciousness of guilt.' This evidence, corroborated as it was by the eyewitnesses, was responsible for these verdicts of guilty." [3514]

He then reviewed the evidence at the trial at some length. As before, he placed much emphasis upon the lies told by the defendants, and traced to them the injection into the case of the issue of radicalism.

"Now, the Commonwealth claimed that Vanzetti told these falsehoods because he could not truthfully account for his possession of the revolver the next morning after his arrest because he had stolen it, and later changed his statements because he knew that it could be proven by the Commonwealth that it was not purchased at a store on Washington Street because a record, including its number, would under the law have to be made, and also because if it was true the defendant at the trial would be able to prove said purchase; that it could be proven that the gun was not purchased as stated four years before, because one of the experts called by the defendants testified that the revolver was sixteen years old; that it could be proven that the market price of a Harrington & Richardson revolver of this description was only \$5 and not \$18 or \$19 as stated by Vanzetti; that the Commonwealth could prove that the cartridges did not come out of the same box originally, because three of the five cartridges in the revolver were of one manufacturer's make and two of another and therefore they could not have come out of the same box; and that by examination it could be easily seen that the revolver had five chambers and not six. From the fact that Vanzetti did not know the number of chambers there were in said revolver, the Commonwealth claimed that this statement was made by Vanzetti because he had not had the revolver long enough to even get acquainted with the number of chambers there were in said revolver.

"At the trial Vanzetti testified that he purchased the revolver of one Falcini about three months before his arrest and that he only paid the sum of \$5 for it. At this point we arrive at the very parting of the ways. That falsehoods were told there is no doubt. *The reason why they were told is in great dispute.* The Commonwealth claimed that Vanzetti told these falsehoods because he was trying to cover up his possession of Berardelli's revolver when suddenly confronted with questions about his possession of it, and that his change of statements was made because the defendant knew that the Commonwealth could prove that they were false.

"To meet this claim of the Commonwealth, the defendant testified that he told these falsehoods because he was a radical and that some harm or punishment in some manner might come to him because of this fact. Until Vanzetti took the stand, no reference whatsoever had been made in any manner in the testimony to radicalism. At this point counsel for the defendants were face to face with the question of opening up the subject of radicalism as the reason why the falsehoods were told. Counsel undoubtedly believing in the statements of their clients, adopted the only course that they could have pursued. To allow those falsehoods to go unchallenged would have been fatal in all probability, and if the claim of the defendant was disbelieved by the jury, then the result would have been at least as fatal to the defendants.

"The issue, therefore, was clearly, fairly and intelligently raised and ably argued by counsel before the jury. This issue is clearly one of fact, which the law placed upon the jury to determine and I have no right to [3516] usurp their function nor disturb their verdict, unless I can feel that it is clearly my duty so to do. In other words, if there was evidence that warranted the jury in finding that the revolver found upon Vanzetti was stolen from Berardelli, then there was complete evidence that connected him with said murder. [3517] . . .

"In other words, the claim was that the introduction of this evidence of radicalism, though by the defendants themselves, was so prejudicial to their rights, that they did not and could not have a fair and impartial trial. Suppose now, on the other hand, the jury believed the claim of the defendants and returned verdicts of not guilty, would not then the introduction of this evidence of radicalism been considered as 'life savers'? If this is so, then justice between the Commonwealth and defendants in criminal [3521] cases must depend not upon established facts and truth as found by the jury, but rather upon chance verdicts of guilty or not guilty.

"On this issue I feel like asking these questions: Who first introduced in evidence the subject of radicalism? Was it not the defendants? Who first admitted that they told falsehoods to Chief Stewart and the district attorney although they were warned that they were under no obligation to talk? Was it not the defendants? If they had told the truth, then the evidence of radicalism could never have even reached the threshold of the court house. If they had told the truth, there would have been no necessity for their introducing this evidence of radicalism to explain their reasons for telling falsehoods to both Katzmann and Stewart. Men who tell falsehoods must expect that their falsehoods will be subjected in jury investigations to the usual and ordinary tests of ascertaining the truth, whether they are radicals, conservatives, or their ancestors came over in the Mayflower.

"Testimony becomes prejudicial or favorable as it is believed or disbelieved by juries. If this evidence became prejudicial, it was because the jury disbelieved it, for all evidence introduced as a defense in all criminal cases that is disbelieved by the jury is generally prejudicial to defendants. If the jury believed it, would it then have been prejudicial? But whether they believed it or not, we do not know, but this we do know, that the issue was exclusively within their province to believe or disbelieve." [3522]

Much stress was also placed upon the testimony relating to the attempted use of guns by the defendants at the time of their arrest:

"For some reason, there seems to be a desire to omit on the part of some this most important piece of testimony from a true and impartial history of these cases. In my judgment, the testimony of the two arresting officers, if believed, was of the greatest potency. The two police officers who arrested the defendants on the electric car that runs from West Bridgewater to Brockton on the night of May 5th, gave testimony that tended to prove that Vanzetti reached for his hip pocket and one of the officers¹ testified that he said to him, 'keep your hands on your lap or you will get into trouble'; that soon after this, a loaded Harrington & Richardson revolver of 38 caliber was taken from his hip pocket; that one of the officers testified that while in the automobile en route for the Brockton police station, Sacco reached his hand to put under his overcoat and he (the officer) told him to keep his hands outside of his clothes and on his lap; that this same officer testified as follows when asked to indicate at what [3518] point he put his hand under his overcoat; 'just about the stomach across his waist band.' The officer then asked Sacco, 'Have you got a gun there?' and Sacco replied, 'No, I ain't got no gun.' 'Well,' the officer replied, 'keep your hands outside of your clothes.' The officer further testified that 'we went a little further and Sacco did the same thing.' The officer then testified that he put his hand under Sacco's coat, but did not see any gun, and he also said then to Sacco, 'Mister, if you put your hand in there again, you are going to get into trouble,' and Sacco replied, 'I don't want no trouble.'

"After arriving at the Brockton police station, Sacco was searched and inside the waist band of the front part of his trousers there was found a loaded Colt automatic pistol of 32 caliber with eight cartridges in it, and twenty-four loose cartridges in his overcoat pocket.

"Both of the defendants denied this testimony of the officers in toto, but that denial did not settle this question, for the jury had a right to believe the officers and if they did, then this evidence is entitled to great weight and consideration. It cannot be brushed aside by the mere wave of the hand, for the jury had a right to determine the reason why these defendants carried upon the night in question loaded guns, and they also had a right to determine that radicalism had nothing to do with their carrying these guns and that radicalism had nothing to do with their attempt to use these guns upon the officers. The defendants have made no claim to that effect, because it is their claim that there was no such attempt on their part. I have referred to it for the purpose of showing that the jury had a right to eliminate radicalism as a reason for either carrying the loaded guns as well as their attempted use of them upon the officers." [3519]

Summing up the question of consciousness of guilt Judge Thayer said:

"In other words, the defendants admitting that falsehoods are evidence of guilty consciousness, yet they claimed they were only consciously guilty of being radicals, which might subject them to deportation or other punishment, *but not consciously guilty of the murder of Parmenter and Berardelli*. No clearer cut question of fact was ever tried out before any jury, and it became their duty to pass upon the truthfulness of the claims between the Commonwealth and the defendants. To do this they would determine whether there was a more logical reasonable and probable connection be-

¹ Connolly.

tween the falsehoods and other conduct of the defendants and radicalism, or the murder of Parmenter and Berardelli. If the jury under their oaths believed that the murder of Parmenter and Berardelli was the only true and logical determination of this question, should I say, by setting aside their verdicts that they ought not to have so found, especially when both defendants admitted in cross examination that they saw no logical connection between their fears from radicalism and the falsehoods they told to the district attorney?" [3524]

The opinion seeks in part to answer criticisms of the verdicts, and as in the opinion of 1921, much emphasis is placed on the fact that the jury had seen the witnesses:

"In human investigations of controverted questions of fact, it is extremely important that the jurors, in order that they may arrive at a true verdict, should have the benefit of hearing all the evidence, observing all the witnesses, and examining all the exhibits. The law securely guards the rights of the Commonwealth and defendants alike in criminal cases with this protection, in order that justice and truth may be established. And yet, notwithstanding this just, humane and intelligent provision of law, there are some who ever stand ready, through sympathy, prejudice or some other unaccountable reason, to criticize and assail the verdicts of juries when, in fact, they never have heard a single word of the evidence, nor observed a single witness on the stand." [3525]

And, referring also to the other motions he was deciding at the same time, Judge Thayer said:

"To grant a motion in these cases upon the affidavit of Andrews, Goodridge or Pelsner, as they were procured, would be a reflection not only upon the court, but a great injury as well to the ethics of the legal profession throughout the Commonwealth. To set aside the verdicts of this jury on the McAnarney, Proctor and Gould affidavits, so weak, so unsatisfactory and unconvincing as they were, would result in sacrificing not only the rights of the people of the Commonwealth, but the rights of the jurors themselves, and such act on my part could not be said to be controlled by the sound rules of the law, nor would it be governed by reason, logic, conscience, or sound judgment.

"In the determination of this motion, or any other in which new trials have been denied, if I have erred in my judgment (and I fully realize that I am human), let me express the assurance that the supreme judicial court of this Commonwealth in due time will correct such error. Therefore, for the reasons herein given, and others not herein specifically mentioned, the motion of the defendants for a new trial, based upon the Gould affidavit, should be and the same is herein and hereby denied." [3527]

d. *The Pelsner Motion*

The petition on which the Gould motion was based included a reference to a statement given on February 4th, 1922, to Mr. Moore by Pelsner, the witness who had testified that Sacco was the "dead image" of the man he had seen shooting at Berardelli. In this statement Pelsner repudiated his testimony and reaffirmed the interview he had given to the defense before the

trial to the effect that he had been too scared to notice any one. He implied that the Assistant District Attorney, Williams, had more or less persuaded him to make the identification.

A few days later Pelser communicated with Katzmman and retracted his retraction.¹

In a separate opinion, from which no appeal was ever taken, Judge Thayer characterized Pelser's last statement to Moore as "not at all satisfactory." After quoting some of Pelser's answers the opinion concludes:

"He also affirmed that he had drunk several drinks of liquor on that day, and that he had been out of work four months.

"In the affidavit of Mr. Pelser filed by the Commonwealth, he affirmed that he was not influenced by Mr. Williams or any one else to testify as he did, and further reaffirms that his testimony given on the witness stand was true.

"While this affidavit is much less objectionable than the Andrews and Goodridge affidavits, yet it is not at all satisfactory or trustworthy. To grant a new trial on this affidavit would result in taking away rights of the Commonwealth without excuse or justification.

"There were counter affidavits filed by Messrs. Katzmman and Williams, in which they severally denied that there was any influence whatever exercised upon Pelser as to what his testimony on the witness stand should be. And I find that their affidavits are true. Therefore, in my judgment, the second supplementary motion for a new trial based upon the Pelser affidavit should be denied and the same is hereby denied." [5597]

e. *The Goodridge Motion*

After the trial Mr. Moore went to great trouble and expense to find out the identity and the past record of the witness Goodridge to impeach whom various attempts had been made at the trial. It will be remembered that he testified he had seen Sacco in the automobile as he rushed out from a pool-room on Pearl Street right after the shooting. On July 22nd, 1922, a third supplemental motion attacking the credibility of Goodridge was filed. Voluminous affidavits with numerous photographs were submitted, which cover over one hundred of the closely printed pages of the Holt record (pp. 3742-3850). The basis of the motion was that Goodridge had testified under a false name, his true name being Erastus Corning Whitney, that he had been convicted in 1892 and in 1908 in New York for stealing watches and money, that he had fled from an indictment found in 1911 for a third offense of like character, that he had married under a false name, and that his reputation in different places in which he had lived was bad. It was also alleged that he had expressed malice and hatred toward all Italians, his former wife, Grace Mary Rackliff, stating "he hated all persons that were of Italian nativity . . . on many and divers occasions said that all Italians coming over on the ships to America ought to be sunk in the harbors." [3807] These affidavits, of course, have no bearing whatever on the South Braintree crimes or on the defendants, so no further reference to them seems use-

¹ See Part II, Chapter I, pp. 252-256.

ful here. They indicate an expenditure of energy on the part of Moore and his staff which might well have been devoted to more important matters.

In an affidavit furnished to the prosecution Goodridge made no attempt to dispute any of Moore's contentions, but he charged Moore with having threatened him with arrest under the old indictment and said that Moore had told him he would be saved the trouble of going to New York to answer the old charge if he would disclose the inducement offered by the prosecution for his identification of Sacco. He said he had been held in jail in Augusta for a day while the authorities tried to get word from New York, but that as nothing had been heard he was let go. The prosecution submitted affidavits from the New York authorities to the effect that it was not they who had authorized the arrest and that they did not want the man. Goodridge did not retract his testimony and insisted he had been offered no inducements to testify.¹

In deciding the motion Judge Thayer held that the old New York convictions could not have been referred to at the trial because, under Massachusetts law, no such conviction could be used to impeach a witness after the expiration of ten years from the end of the minimum term of imprisonment. He also pointed out that at the trial evidence had been introduced concerning Goodridge's reputation for veracity and that he had been "effectively impeached" at that time. The Judge then referred at length to the manner in which Moore had sought to obtain the retraction, and characterized it as most unprofessional. After summarizing the events of the night in Maine he concluded his opinion as follows:

"Now, what do these facts show? It is perfectly manifest that here was another bold and cruel attempt to sandbag Goodridge by threatening actual arrest, to blacken the name of the District Attorney's Office of Norfolk County, by compelling Goodridge to affirm that he testified as he did on account of the influence of said District Attorney's office. He did not succeed simply because Goodridge would not be intimidated. An attorney has a perfect right to seek all the facts from a witness, but he has no right to pump fact into him as was attempted in these cases. [3890] . . .

"The situation is now exceedingly clear:—Mr. Moore, with a certified copy of the 1911 indictment in his possession, with knowledge that the state authorities of New York did not want Goodridge, went to Vassalboro, Maine, and after Goodridge had refused to state that his testimony was influenced by the District Attorney's office, Mr. Moore caused his arrest and kept him in jail for two days. Was this conduct on the part of Mr. Moore performed in furtherance of public justice, or was it a cruel and unjustifiable attempt to scare Goodridge into swearing to something that was false against the District Attorney's office? There can be but one answer. If Goodridge had yielded to this most atrocious invasion of his rights and had signed the affidavit to the effect that the District Attorney's office had influenced his testimony at the trial, there would then have been in all probability another affidavit on file today, like others (particularly the Andrews affidavit), charging the District Attorney's office with unprofessional conduct. To the

¹ See Part II, Chapter I, pp. 272-275.

credit of Goodridge, this scheme did not succeed.

"I have tried to look at this conduct of Mr. Moore with a view of finding some justification or excuse of it. I can find none. I attribute it, however, to an over-enthusiastic interest in his client's cause, based upon the fact that belief in the innocence of one's client justifies any means to any desired end. There is no doubt in regard to his untiring efforts in behalf of his clients, and his devotion to their interests, but he has seemed to lose all idea that the Commonwealth has rights, rights that counsel for the defendants must even recognize and respect.

"Taking the affidavit as a test, it is perfectly clear that if either party has been prejudiced in their rights, it is not the defendants but rather the Commonwealth.

"From my finding of facts hereinbefore set forth, I decline to grant new trials based on the Goodridge motion and the same is herein and hereby denied." [3891]

No appeal was taken from this decision.

f. *The Andrews Motion*

The fourth supplemental motion, filed September 11th, 1922, was based on a retraction of testimony obtained by Mr. Moore from Mrs. Andrews. She later claimed this retraction had been obtained by improper playing upon her affection for her son and by Moore's threats that he would disclose information against her character. The details of the affidavits made by Mrs. Andrews are considered later in this book.¹

Judge Thayer denied the motion, beginning his opinion as follows:

"This motion for a new trial is based upon the affidavit of one Lola R. Andrews.

"It is a very unpleasant duty for me to pass judgment upon this motion. This is so because charges of unprofessional conduct are made against counsel on both sides.

"A correct decision, however, of this motion is exceedingly easy. The unpleasant part compels me to come to the conclusion that one of the counsel for the defendants, in obtaining the affidavit hereto attached, has been guilty of unprofessional conduct. I dislike very much, also, to be compelled to mention names, but my obligation to the other counsel for the defendants requires me to so do. The master mind that procured this affidavit was Mr. Moore, who was senior counsel for the defendants at the trial. My relationship with him has been very pleasant, although at times it would seem, as was very natural, that he was quite unfamiliar with our trial evidence and practice in this state. His own motion under oath compels me to make the findings that I am about to make. The most redeeming thing (if I may so dignify the expression) was Mr. Moore's frankness in confirming by his own motion under oath what he did and said in order to secure Mrs. Andrews' affidavit. Mr. Moore, judging him by his conduct as disclosed under his own motion, signed by him, seems to be laboring under the view that an enthusiastic belief in the innocence of his clients justifies any means in order to accomplish the ends desired.

¹ See Part II, Chapter I, pp. 235-241.

"To express my ideas a little differently, let me refer to Mr. Moore's statement in argument, when he said: 'There can be no coercion when the truth is spoken.' The answer to this argument is, there is no need of using any weapon of coercion, fraud, intimidation, and duress in order to obtain the truth. Voluntary truth is not acquired in this manner, and when truth cannot be obtained in an honorable and professional manner, but resort must be had to coercion, intimidation, fraud, and duress, such resort would seem to indicate a more intense desire in this case to procure a confession of perjury from Mrs. Andrews, rather than a profound desire to seek the truth." [3950]

The Judge reviewed the affidavits at length and concluded that Mrs. Andrews's repudiation had been obtained by duress, that charges made by the defense against Williams were untrue and the charges Mrs. Andrews made against Moore had been sustained. No appeal was taken from this determination.

g. The Hamilton Motion

Albert H. Hamilton, a criminologist of extensive experience in gun cases, had become interested in the Sacco-Vanzetti case some time after the trial and had written a letter to Judge Thayer stating that he knew a method of examining the exhibits which would reveal the truth. He had received no answer to this letter; he had by chance had a conversation about the case with a reporter on a train, during which he had refused to express any opinion without first examining the exhibits. A few weeks after this talk he was requested by Mr. Moore to study these exhibits with a view to answering certain questions. In April, 1923, in the presence of representatives of the District Attorney and the Sheriff, Hamilton examined all the pistols, bullets and shells which had been introduced in evidence.

In his examination Hamilton used a high-power compound microscope, a microscope which could measure 1/100,000 of an inch, and had photographs taken by one Wilbur F. Turner through the microscope. As a result of his investigations the Fifth Supplemental motion was filed on April 30th, 1923. This motion was signed only by Messrs. Jeremiah J. McAnarney and Thomas F. McAnarney as counsel for Vanzetti, since Sacco was at that time in the State Hospital for the Insane. The affidavits used on the motion were filed later, after William G. Thompson became attorney for the defendants.

The chief affidavit was made by Hamilton on October 15th. In it he discussed the identity of the five bullets taken from the bodies of the murdered men, which had been described at the trial as fired from a "Savage" revolver. He concluded that neither the shell found at the scene of the crime and known as F4, nor the mortal bullet, Exhibit 18, had been fired from Sacco's pistol. He discussed Vanzetti's revolver and expressed the opinion that the hammer was not new. On all these points he gave reasons for his conclusions. He submitted, as did Professor Gill of the Massachusetts Institute of Technology, detailed measurements of the barrel of Sacco's gun and the grooves and lands of the mortal bullet; Gill also measured some of the Winchester

bullets which at the Lowell tests had been fired through Sacco's pistol. Opposing affidavits were filed by experts for the prosecution. These gave measurements which differed in some particulars from those submitted by the defense and they disputed the conclusions Hamilton had reached, but on the subject of the Vanzetti revolver the prosecution's experts said nothing. The various contentions here referred to are analyzed in more detail in Part II, Chapter II of the present volume.

To the ordinary reader the mental processes of the experts are difficult to follow. Apparently these men were willing to draw inferences from the most uncertain data and to support their conclusions by reasons which might almost as well support the contrary results. One thing, however, seems clear: that at the trial the whole subject of bullets and pistols was treated with marked superficiality. What conclusions a jury might have reached from the data presented on this motion no one can say.

Judge Thayer decided the motion chiefly because he was unwilling to believe that experts of the eminence of those selected by the prosecution would have committed perjury, and because Hamilton, whom he criticized for undue zeal on behalf of the defense, left him unconvinced. He expressed no opinion of his own on the crucial question whether the mortal bullet had been fired by Sacco's pistol.

h. The Proctor Motion

Whether the mortal bullet had been fired through Sacco's pistol was dramatically brought to the attention of the Court in a supplemental motion filed on November 5th, 1923, by Mr. Thompson as attorney for both defendants. This was based upon an affidavit of October 23rd by the government's expert Proctor in which he referred to his testimony at the trial to the effect that in his opinion bullet No. 3 was "consistent with" having been fired from Sacco's pistol. At this time Proctor said his answer at the trial had been prearranged because before the trial he had told Mr. Williams he could not say the bullet had been fired through that gun. He said he had meant by the words "consistent with" only that the bullet had been fired through some Colt pistol.¹ No substantial denial of Proctor's statement was made by either Katzmann or Williams; both took advantage of Proctor's language to the effect that he had "repeatedly" told them what his views were, to deny that he had "repeatedly" done so. Williams did admit, however, that Proctor had told him he could not tell from which pistol the bullet had been fired. On the argument of the motion a suggestion was made that Proctor be examined by the Judge, but this was not done. Proctor died on March 8th, 1924, before the motion was decided.

A separate opinion was written by Judge Thayer on this phase of the Hamilton, or Fifth, motion. He concluded that there was nothing unfair in the questions asked Proctor, that Proctor had understood what was meant, that the Court had not been deceived by his answer and that there had been no wrongdoing on the part of the District Attorney.

¹ The affidavits and opinions are quoted and discussed in Part II, Chapter II, pp. 343-350.

i. The Appeal from the Conviction and from the Denial of the Motions

After the decision of the motions Mr. Moore and the brothers McAnarney withdrew entirely as counsel and were replaced by William G. Thompson.

Mr. Thompson accordingly took charge of the appeal in which was included not only the judgment of conviction but also the denials of the Ripley, Gould, Hamilton and Proctor motions. Mr. Thompson argued this appeal before the Supreme Judicial Court in Boston on January 11th, 12th and 13th, 1926. The long delay between the denial of the motions in 1924 and the argument of the appeal was due in part to the labor of preparing the voluminous records and having them approved by the Judge.

During this period Vanzetti who was in Charlestown jail serving his sentence for the Bridgewater hold-up developed symptoms which caused him to be sent to the Bridgewater State Hospital. On a Court order he was committed to Bridgewater on January 2nd, 1925, but returned to Charlestown on April 23rd, of the same year. During his stay at Bridgewater no abnormal mental reactions were observed in him nor was any evidence of hallucinations found. As no formal Court order adjudicating a return to sanity was ever entered doubt was expressed on the appeal, both in the record and in the briefs, about the propriety of counsel's acting on his behalf under these circumstances. In its decision the Court disposed of this point by saying that the hospital's request for his return amounted to an adjudication of the patient's sanity.

The brief for the defense was written by Mr. Thompson, assisted by Messrs. Rodney Spring, George E. Mears, Francis G. Moulton and Richard H. Wiswall. The District Attorney's brief bore the names of Dudley P. Ranney, who argued the appeal, and of Winfield M. Wilbar and William P. Kelley. The exceptions taken at the trial were, in the brief for the defense, discussed under twenty-eight separate heads. The brief for the prosecution discussed the same matters, but in a very different arrangement. There seems to have been no attempt to answer the specific arguments of the defense; nor was any reply brief prepared by Mr. Thompson. As the Court, in its decision, followed in the main the order of arrangement adopted by the defense, that order will also be followed here.

In considering the questions presented and the decision on the appeal, it should be remembered that the Supreme Judicial Court of Massachusetts did not have then, and has not now, power to review the facts but is limited to a review of questions of law, such, for example, as errors arising from the wrongful admission or exclusion of evidence, errors in the charge, or other specific matters arising upon the trial to which attention has been called by counsel in appropriate objection and exception. This rule arose at a time when three judges presided over capital cases. The Court of course did have power to decide whether or not under all the evidence, assuming the jury to have decided every dispute against the accused there was proof enough to justify conviction. But it did not have the right possessed by some courts

of review to weigh the evidence and the probabilities and decide whether the jury, as reasonable men, should have convicted.

The Judges who heard the appeal were Chief Justice Rugg and Justices Braley, Carroll, Wait and Sanderson. Decision was rendered on May 12th, 1926, in a long opinion written by Justice Braley. It is reported under the name *Commonwealth v. Sacco* in 255 Mass. 369 and in 151 N.E. 839.

Of the twenty-eight points raised at the trial four related to matters of procedure: the demurrer which had remained undecided, the bill of particulars only partially granted, the question of a separate trial for Sacco and the manner of adding talesmen after the first panel had been exhausted. As to the first, the Court remarked that counsel had been satisfied to go to trial without a decision; as to the second it was decided no further particulars were needed. The denial of the motion for a separate trial and the method adopted in selecting the jury were upheld as within the discretion of the trial Court.

Some explanation is in order of the term "discretion" so frequently used in this opinion. Things may occur in the conduct of a law suit, civil or criminal, which are a direct violation of the rights of one of the parties; and in regard to such matters the trial judge is said to have no discretion. That is to say, an error committed by him will, if the point is deemed material to the result, bring about a new trial. To permit a District Attorney to comment on the failure in a criminal case of a defendant to take the stand on his own behalf is a clear illustration of such error. So again, to allow hearsay evidence on a vital point of a case, would be reversible error. On the other hand, for instance, the extent to which one party may be allowed to cross-examine another cannot be laid down in advance with any degree of certainty, since it depends upon the circumstances of each particular case. Therefore the trial judge must be allowed considerable latitude, or discretion, in deciding what to permit and what not to permit. Questions arise in regard to order of proof and other details, very important ones, sometimes, which must likewise be left to such discretion. The extent to which the judge himself may take part in the examination of witnesses (unless it be absolutely prohibited) is another such subject.

To maintain that something was within the discretion of the judge does not, of course, altogether preclude review by a higher court. It can always be charged that the trial judge abused his discretion, in which event it becomes incumbent upon the appellate court to look into the matter and decide whether a fair and reasonable judge might have acted as did the trial judge. The appellate court does not inquire whether he must so have acted, nor even whether he should according to their own best judgment have acted in that way but only whether his was the sort of act one might conceive of a judicial person's doing. It can readily be seen how easily an appellate court, provided it really wants to, can decide a difficult case, one containing many doubtful points of discretionary action by the trial judge, in any way in which it really prefers to have the decision go. It can refuse to discuss the real questions, hiding under the wide skirts of judicial discretion; or,

shocked at the human error behind the ermine, it can require a new trial. From time immemorial courts have found ways to accomplish their real desires: hence the maxim "hard cases make bad law."

In the Sacco-Vanzetti case it will be found that in every instance the Supreme Judicial Court decided that Judge Thayer had not abused his discretion. With the decision that the particular matter lay in the shadowy realm of the discretionary there can be little quarrel; about the final approval of the result there have been serious differences of opinion, particularly because the Court failed to take into consideration the cumulative effect of the various discretionary acts. The four points relating to procedure which have already been referred to need detain us no longer.

It will be remembered that at the end of Mr. Katzmann's closing address counsel for Vanzetti had moved for a verdict of not guilty on the ground that the disclaimer of Levangie's testimony to the effect that Vanzetti had been driving the murder car left no sufficient evidence to warrant conviction. This question was argued on the appeal. And the Court decided that there was other evidence tending to connect Vanzetti with the crime, the probative effect of which was solely for the jury:

"Although no witness identified Vanzetti as one of the persons who actually fired the fatal shots, or as being at the immediate scene of the homicide, there was evidence that he was in South Braintree on the morning of April 15, and was seen in a five or seven-passenger automobile in the public square of the town, and there was evidence also that this automobile was the car in which the murderers made their escape. There also was some evidence that Vanzetti was in Brockton in an automobile corresponding in description with the automobile in question on the afternoon of April 15. He was identified at the railroad grade crossing in Matfield later in the afternoon where the automobile was appreciably stopped because the gates were [4314] down. The jury were warranted in finding from a plan introduced in evidence and from a view which included the alleged route taken by the bandit automobile, that the course taken included the localities to which reference has been made. Also there was evidence, the probative effect of which was for the jury, that Berardelli owned a .38-calibre Harrington and Richardson revolver which he had on his person Saturday night before the shooting, and that this revolver, after the shooting, was found fully loaded in the possession of Vanzetti after his arrest. It further could be found that on the evening of May 5, 1920, Vanzetti, in company with Sacco, one Orciani, and one Boda, was at the house of Mrs. Ruth Corinne Johnson, a witness for the Commonwealth, in West Bridgewater, where they had gone for an automobile belonging to Boda, which was in her husband's garage, apparently being repaired. Mrs. Johnson's suspicions having been aroused by their appearance, she went to a neighbor's house, referred to as the Bartlett house in the record, followed by Vanzetti and Sacco walking on the other side of the road, to call the police. Vanzetti and Sacco then boarded an electric car, in the vicinity, for Brockton, the conductor of which testified that he recognized Vanzetti as one of two men who had ridden on his car on an evening nearly at the same date as the murder and that they entered the car in the vicinity of the Manley Woods going toward Brockton; these

woods were near Manley Street in West Bridgewater where, as the jury could say, the 'bandit car' ultimately was found. It was in evidence that a gun with a long barrel protruded through the broken back window of the car when it passed up Pearl Street, and there were found on Vanzetti shotgun shells loaded with buckshot. It is true that Vanzetti, who lived in Plymouth, introduced evidence which tended to show that he was not at South Braintree on April 15, as well as in explanation of his having the revolver, where he obtained it, and his possession of the shotgun shells. Although no witness could give direct evidence of the fact to be proved as to Vanzetti, viewing the evidence in the light of common experience, it could be determined to be so related to the fact in question that, applying experience to cause [4315] and effect, a satisfactory and positive conclusion is reached." [4316]

Two points arose in connection with Mr. Katzmann's summation: his claim that Sacco had denied ownership of his own cap and his comment on the failure of the defense to produce Orciani. The Court held that the argument about the cap did not exceed the reasonable rights of the Commonwealth, both because more than one inference could be drawn from the record and because Sacco's credibility was for the jury.¹ Dealing with the second point the Court said:

"On this evidence and the reasonable inferences to be drawn therefrom, it was for the jury to determine whether the defendants knew, or could have ascertained, where Orciani was and summoned him as a witness, and whether, if so summoned, his evidence would have been favorable to them [4342]. . . . We discover no error. 'The practice of permitting counsel to comment on the failure of the opposing party to call witnesses to facts needs to be used with caution, and such comment should be permitted only where it appears that the witnesses could have been produced, and that it is a fair inference from the conduct of the party, under all the circumstances, that he knew or believed that the testimony of the witnesses would be adverse, and for that reason did not produce them.' *McKim v. Foley*, 170 Mass. 426, 428. 'The mere fact that a witness is available to both parties does not necessarily preclude a jury from drawing an inference from the failure to produce him. If the state of the evidence,' as in the cases at bar, 'is such that the burden devolves upon one party of meeting a fact as to which the other party has made out a *prima facie* case, and the testimony of the absent witness would be material on that issue, and he is available to the party that reasonably would be expected to call him, then the determination of what, if any, inference should be drawn from his absence is for the jury.' *Little v. Massachusetts Northeastern Street Railway*, 229 Mass. 244, 247." [4343]

The remaining points had to do with the admission or exclusion of evidence. In a number of instances it was held that if an error had been committed it had in some way been corrected, as when, for example, a question once excluded had later been substantially permitted in another form. Other objections were overruled because held to be within the trial court's discretion. One of the exceptions was based on Judge Thayer's refusal to

¹ This is quoted in Part II, Chapter III, pp. 387, 388.

allow the cross-examination of Goodridge in regard to his plea of guilty and his consequent probation.¹ It was claimed, in defendants' brief on the appeal, that the purpose of the question was to show that the witness was testifying under a promise of leniency and was biased. [4037] In sustaining Judge Thayer the appellate court said:

"The ruling was right. There had been no conviction and there was no evidence that the witness had been promised that if he would testify for the Commonwealth in the cases at bar the case against him for larceny would be filed, and that he would be placed on probation. G. L. c. 233, § 21. *Commonwealth v. Walsh*, 196 Mass. 369. *Attorney-General v. Tufts*, 239 Mass. 458, 537." [4327]

On an informal application for a rehearing, made the day after the decision was handed down, it was again pointed out that it was just for the purpose of eliciting such evidence that the question had been asked. No rehearing was, however, allowed. This ruling has been criticized in legal circles on the ground that all the facts should have been available to the jury so that it might have drawn such inferences as were reasonable under the circumstances. Recently the Supreme Court of the United States reached a different result in an almost identical case.²

Discussing the exclusion of questions tending to bring out what had been said by persons brought to the jail to identify the defendants, the Supreme Judicial Court stated the following:

"A police officer, Michael J. Connolly, who arrested the defendants on the night of May 5, 1920, on the trolley car, and took the weapons and other articles from them, was shown on cross-examination to have been watching the prisoners at the police station whenever persons came there to identify them. He was asked, 'Were you there when any one came in there and said anything indicating that they did not recognize these men?' The question was excluded rightly. Evidence of acts and words of those who came for the purpose of identifying the defendants does not derive its value from the credit to be given the witness, but rests in [4327] part on the veracity of the observer. It was hearsay. *Commonwealth v. Ricker*, 131 Mass. 581. *Elmer v. Fessenden*, 151 Mass. 359. It is urged that the question was not asked to show that the defendants were not the men who committed the murder, but to show that the Commonwealth had not produced certain eye-witnesses who were prepared to testify that the defendants were not the men and is not, therefore, hearsay. There was nothing to show that the Commonwealth was suppressing evidence." [4328]

The objection to the cross-examination of Sacco about his beliefs was gone into at length.³ The evidence was summarized and the examination sketched briefly. It was held proper as within the rule that a defendant who himself testifies puts his credibility in issue, and can therefore be attacked on anything he has done or on his prejudices, or his mental idiosyncracies.

¹ See pp. 52, 266, 267.

² See pp. 268, 269.

³ See p. 463.

The argument of the defense that the real purpose of this questioning had been, not to test Sacco's credibility, but to arouse prejudices against him, was held not borne out by a reading of the record.

An attempt had been made to prove, in corroboration of Mrs. Brini, an alibi witness, that there was a record showing a nurse had visited her on April 15th, 1920. The nurse who paid the call had no recollection of the date, and the nurse who recorded it had no personal knowledge that it had actually been made. Judge Thayer therefore refused to permit the record to be received in evidence on the ground that it was only hearsay. The higher court, pursuant to well settled rules of law, sustained this ruling, saying:

"The entries made by the witness were not made from her personal knowledge, but were made from information furnished by others. They would not have been admissible if offered by the Commonwealth against the defendants, and in principle they are not admissible in favor of the defendants. *Kaplan v. Gross*, 223 Mass. 152. *Commonwealth v. Perry*, 248 Mass. 19, 29." [4335]

The participation of Katzmann in the motions subsequent to the trial was criticized by the defense on the ground that there was no warrant in law for his appointment as assistant district attorney. This statement was brushed aside by the Supreme Judicial Court as of no importance, since despite irregularity in the appointment, no harm had been done to the defendants.

The prosecution claimed that the motions for a new trial had been filed too late; but this claim was disposed of by pointing out that the law had been amended in such a way as to make the motions timely.

Dealing with the motions themselves the Court pointed out that the burden was on the defendants to prove the facts relied on:

"it was for the judge on all the evidence to find the facts; and the credibility of the affiants and the weight to be given to their statements was for him. He could accept in whole or in part, or reject in whole or in part and the question of a new trial was a matter of discretion. *Commonwealth v. Crapo*, 212 Mass. 209, 210." [4349]

The Court found no error in the trial judge's rulings on the Ripley motion; the failure specifically to pass on the Daly affidavit was held unimportant because a denial was implicit in the denial of the main motion. The fact that Daly was not contradicted was not conclusive because the judge did not need to believe him:

"Even though the Daly affidavit was undisputed, the judge was not bound to believe him, nor was he required to give the reasons for his action. *Commonwealth v. Crapo*, 212 Mass. 209. Furthermore, before being sworn as a juror, it must be assumed that Ripley had answered in the negative the statutory questions put by the judge in his preliminary examination, whether he had expressed or formed an opinion, or was sensible of any bias or prejudice." [4350]

The Hamilton-Proctor motion was next dealt with. The opinion stated that Judge Thayer was entitled to his own judgment on the points raised and was not bound to follow the experts even when they had not been contradicted, and that the reasons he gave in his opinion did not constitute rulings of law which were subject to review. It was also held that the Judge's conclusion that there had been no misconduct on the part of the prosecution in connection with Proctor's testimony was final.¹

The same general considerations disposed of the Gould motion. The Court in effect ruled that, so long as the trial Judge had given the matters consideration, there could be no review of his decision.

j. *The Motion Based on the Medeiros Confession*

During the pendency of the appeal from the judgment of conviction and from the denial of the various motions Sacco, in the jail at Dedham, had made the acquaintance of Celestino Medeiros,² a young Portuguese fellow convict. Medeiros had been convicted, on his own confession, of a murder committed in 1924 during a hold up at Wrentham and had appealed from this conviction on technical grounds. In November, 1925, he made an unsuccessful attempt to send a message to the *Boston American*, and thereafter caused to be delivered to Sacco a slip of paper on which he had written a confession of his participation in the South Braintree hold-up. He was interviewed at once by Mr. Thompson, but refused to divulge the names of his associates, describing them only as Italians who had been engaged in robbing freight cars in Providence. Mr. Thompson communicated these facts to Mr. Ranney, the Assistant District Attorney, but they were not made public, lest Medeiros' chances on a possible second trial for the Wrentham murder might be damaged. The Supreme Judicial Court having on March 31st, 1926, reversed the conviction of Medeiros, and his new trial having on May 20th resulted in a second conviction, Mr. Thompson, on May 26th, filed a motion for a new trial for Sacco and Vanzetti based on this confession of Medeiros and on certain confirmatory matters which had in the meantime been discovered.

It appeared that, in 1920, there had been a gang of Italians operating in Providence, R. I., and also in New Bedford, Mass., the chief members of which were Joe Morelli and his brothers Frank and Fred Morelli, and that they had in the spring of that year been apprehended for robbing freight cars. Some of the shipments which they had stolen had come from the shoe-factories in South Braintree. On April 15th, 1920, most of the members of the gang, including Joe, were at liberty. Their trial took place in Providence in May of that year, and resulted in conviction; and in 1926 Joe was still serving time. Most of the foregoing details were worked out by a young Boston attorney who came into the case at about this time, Mr. Herbert Ehrmann. Ehrmann went to the prison in Leavenworth and interviewed Joe Morelli, but with no success. Medeiros would never admit publicly that the

¹ See Part II, Chapter II, pp. 350, 351.

² The name is given as Madeiros in many parts of the record.

Morelli gang was implicated, but that he had privately admitted this was sworn to by a number of persons. Voluminous detailed affidavits were submitted by both sides. Medeiros himself was subjected to examination by Mr. Thompson and to cross-examination by Mr. Ranney, but not in the presence of Judge Thayer. The important parts of this examination and the affidavits are in the present volume analyzed and, in certain instances, quoted in a chapter devoted to the Medeiros confession.¹

The argument on this motion took place before Judge Thayer in September, 1926, after the second conviction of Medeiros had been affirmed. The affidavits and deposition were read to the Judge, but Medeiros was at that time neither produced nor questioned. Neither were any of the Morellis produced for examination, although affidavits were obtained from some of them.

The motion was also based on some affidavits disclosing a relation between the District Attorney and the United States Department of Justice. In 1922 Moore had obtained, but never used, an affidavit from one Ruzzamenti in which he stated it had been suggested to him by Ferri Felix Weiss, a former agent of the United States Department of Justice, that he see Katzmänn in order to obtain employment as a spy on Sacco in jail. This plan had fallen through but another spy, Carbone, had been in fact placed in a cell next Sacco's, at the suggestion of William J. West, then in charge of the Boston office of the Department of Justice. These facts came to light in an affidavit obtained by Mr. Thompson in 1926 from Fred J. Weyand who, from 1916 to 1925, had been a special agent of the Department of Justice concerned with activities against radicals. He, and another former agent, Lawrence Letherman, stated there had been coöperation in regard to the case of Sacco and Vanzetti between the District Attorney and the Department of Justice, and that the extent of it would be disclosed by the files of the Department. Weyand said:

"Shortly after the trial of Sacco and Vanzetti was concluded I said to Weiss that I did not believe they were the right men, meaning the men who shot the paymaster, and he replied that that might be so, but that they were bad actors and would get what they deserved anyway.

"Instructions were received from the Chief of the Bureau of the Department of Justice in Washington from time to time in reference to the Sacco-Vanzetti case. They are on file or should be on file in the Boston office.

"The understanding in this case between the agents of the Department of Justice in Boston and the District Attorney followed the usual custom, that the Department of Justice would help the District Attorney to secure a conviction, and that he in turn would help the agents of the Department of Justice to secure information that they might desire. This would include the turning over of any pertinent information by the Department of Justice to the District Attorney. Sacco and Vanzetti were, at least in the opinion of the Boston agents of the Department of Justice, not liable to deportation as draft dodgers, but only as anarchists, and could not be deported as anarchists unless it could be shown that they were believers in anarchy, which

¹ See Part II, Chapter VII, pp. 510-534.

is always a difficult thing to show. It usually can only be shown by self-incrimination. The Boston agents believed that these men were anarchists, and hoped to be able to secure the necessary evidence against them from their testimony at their trial [4503] for murder, to be used in case they were not convicted of murder. There is correspondence between Mr. Katzmann and Mr. West on file in the Boston office of the Department. Mr. West furnished Mr. Katzmann information about the Radical activities of Sacco and Vanzetti to be used in their cross-examination. . . .

"What I mean is that I think they did not believe in organized government or in private property. But I am also thoroughly convinced, and always have been, and I believe that is and always has been the opinion of such Boston agents of the Department of Justice as had any knowledge on the subject, that these men had nothing whatever to do with the South Braintree murders, and that their conviction was the result of coöperation between the Boston agents of the Department of Justice and the District Attorney. It was the general opinion of the Boston agents of the Department of Justice having knowledge of the affair that the South Braintree crime was committed by a gang of professional highwaymen." [4504]

Letherman stated:

"The Department of Justice in Boston was anxious to get sufficient evidence against Sacco and Vanzetti to deport them, but never succeeded in getting the kind and amount of evidence required for that purpose. It was the opinion of the Department agents here that a conviction of Sacco and Vanzetti for murder would be one way of disposing of these two men. It was also the general opinion of such of the agents in Boston as had any actual knowledge of the Sacco-Vanzetti case, that Sacco and Vanzetti, although anarchists and agitators, were not highway robbers, and had nothing to do with the South Braintree crime. My opinion, and the opinion of most of the older men in the Government service, has always been that the South Braintree crime was the work of professionals.

"The Boston agents of the Department of Justice assigned certain men to attend the trial of Sacco and Vanzetti, including Mr. Weyand. Mr. West also attended the trial. There is or was a great deal of correspondence on file in the Boston office between Mr. West and Mr. Katzmann, the District Attorney, and there are also copies of reports sent to Washington about the case. Letters and reports were made in triplicate; two copies were sent to Washington and one retained in Boston. The letters and documents on file in the Boston office would throw a great deal of light upon the preparation of the Sacco-Vanzetti case for trial, and upon the real opinion of the Boston office of the Department of Justice as to the guilt of Sacco and Vanzetti of the particular crime with which they were charged." [4506]

Mr. Thompson, on July 3d, 1926, wrote to United States Attorney-General Sargent requesting access to these files. On July 13th, Mr. Dowd, then in charge of the Department's Boston office, telephoned to Mr. Thompson stating that he had been instructed by Mr. Sargent to find out what it was Mr. Thompson wanted to have. The latter replied that his letter showed what he wanted, and that that included truthful answers to such questions as he might put to Mr. West as well as an inspection of the files. According

to Mr. Thompson's account, Mr. Dowd having answered that he had no authority to permit this, Mr. Thompson replied that in that case he had no desire to confer:

"I stated to him in general the contents of the affidavits of Messrs. Weyand and Letherman, and added that I thought it strange that the Department of Justice should think it good policy, or consistent with fair dealing, to put itself in the position of secreting or holding back evidence that might show that two men had been unjustly convicted whatever else it might show about the conduct and motives of the Boston agents of the Department of Justice and of the superiors under whose instructions they acted. Mr. Dowd replied that it was not for him to judge of such matters, and that all he could do was to follow his instructions, and not to exceed them." [4543]

The files of the Department of Justice were never disclosed.¹

Two affidavits were submitted on this subject by the Commonwealth. Michael Stewart, formerly Chief of Police of Bridgewater, who had been in charge of the preparation of the case, said he had had nothing to do with the United States Department of Justice. Mr. Katzmänn denied some of the statements attributed to him by Ruzzamenti, but said nothing on the subject of coöperation.

It was also contended by the defense that the prosecution had suppressed testimony, Mr. Thompson referring in an affidavit used on the Medeiros motion to reports made after the Braintree shootings by Pinkerton detectives. These showed that Miss Splaine and other witnesses had a few days after the crime identified a picture of "Tony the Wop," one Palmisani, as the man they had seen, and that Louise Hayes and Minnie Kennedy had observed the chauffeur of the bandit car and had been interviewed by Katzmänn. Mr. Thompson procured affidavits from these two women in which they described the driver of the car as light-haired. Both said they had told this to Katzmänn and had given him a written statement, but had not been called as witnesses.

On the argument of this motion Mr. Thompson said about the matter concerning the Department of Justice:

"You may search the affidavit of Mr. Katzmänn from beginning to end and you will find no mention, no shadow of denial, of any of the facts stated in the affidavits of Letherman and Weyand. I mention that at the outset merely by way of illustration of the point that I desire to emphasize and to continue to emphasize throughout this case, that we are to try it upon what is contained and, above all, upon what is not contained, upon the inferences to be drawn from what is not contained in the Government's affidavits, and that it is too late now to supplement those silences and those admissions by any statements of fact by counsel. . . .

"And I shall say further that there can be no question, on the disclosures now made, that this Court was grossly imposed upon in the requests that were made for the introduction of evidence, in that the Court was requested

¹ An unofficial summary of the files was reported in the press. See page 20.

to rule—for instance, I may speak now of the cross-examination of Sacco—I am going to read it later—by Mr. Katzmann. When those questions were put to him and objected strenuously by counsel for Sacco and Vanzetti, Mr. Katzmann asked your Honor to admit those questions concerning Sacco's radicalism on the ground that he wanted to test the sincerity of Sacco's claim that he was a radical at all, and it was on that ground that your Honor admitted those questions and was sustained by the Supreme Court.

"What does your Honor think now? That was not his reason. That is one way in which he was paying part of his bargain with the United States officials, they to furnish him evidence to convict, and he to cross-examine, as stated point blank in those two affidavits, for the purpose of getting evidence to use against Sacco's friends and radical associates.

"If your Honor had known that when Mr. Katzmann stood up here and asked you to admit that cross-examination, damaging in the last degree to Sacco and Vanzetti, would you have admitted it? Would you have permitted yourself to be used as a tool to play the part of the Federal officials who come in here now uncontradicted, uncontradicted, begged and besought to disclose their files, and to make their statements, if they have any to make, and escape this astounding charge, and say, 'If we thought we could not get enough evidence to prove them guilty of radicalism it was good enough to have them killed for murder?' [4378] . . .

"Now, you never in the world can convince the common sense of mankind that it is justifiable to send two men to the electric chair when it stands unanswered and uncontradicted in the case that there is documentary evidence in the possession of your national government having the greatest possible bearing upon the innocence or guilt of these men and on the methods by which they were entrapped and they refuse to produce it.

"I cannot put that too strongly, I cannot put that too strongly. If I were not counsel in this case, if I were not employed in this case, if I were a mere member of the Bar sitting here listening to somebody else trying this case, and that man should forget to mention that fact I should be tempted as an American citizen with some regard to the honor of my country and its reputation in foreign lands to beg and beseech this court to think well and think twice before refusing a new trial where the situation was such as it is here.

"Just think of what it means, if your Honor please! Think of what it means!

"Mr. Katzmann knew and knows today whether Fred Weyand and Lawrence Letherman told the truth. That truth is a truth of vital importance. Think what they say! The files of the Boston office are full of correspondence with Mr. Katzmann and of documents showing the closest co-operation between the Federal Agents and the District Attorney—not Stewart—the District Attorney in the preparation of this case. Every Federal agent who knew anything about it believed these men to be innocent of murder. 'Every one of us believed they ought to be deported. They were anarchists, they did not believe in organized government or private property.'

"Oh, how those words will ring around this world, 'private property'! Think what is going to be said about it! The man who does not believe in private property in America may be killed whether he is guilty or not. That is going to be said from one end of the world to the other if this thing is allowed to go through. Can we afford it? [4379] . . .

"Is there anything so exalted in the office of the Attorney General of the United States that the inference that you draw against any other men who hold back documentary evidence should not be drawn in this case? I am not talking about him personally, of course; I am talking about him in his official capacity. Personally, I have no doubt he is an admirable citizen. But there is some reason of strong policy why those papers are not produced here. What can that reason be? What can it be? Are you going to say because Sacco and Vanzetti are Italians, because these are poor folks, because they are aliens, because they have no constitutional rights we will let Mr. Sargent hold back what might set them free?

"I had always supposed that he who refused evidence which he could produce, which was traced into his possession, which he does not deny that he has, who impliedly admits it as Dowd did to me—I said, 'Will you let me look at the papers?' He said, 'I will not.' If there had not been any there he would have said, 'Certainly; there are not any here.' I had always supposed that only one inference was possible to be drawn when a man does not want evidence to be seen, and that is that if it were seen it would be detrimental to his case or in some way to him or to the government that he represents or to the office he holds or to his predecessor or to the transactions of Mitchel Palmer.

"You know what Judge Anderson thought of those transactions. [4381] You know what Moorfield Storey thought of those transactions, you know what twelve of the most eminent lawyers of this country thought of those transactions, and if those papers were produced we should know more about those transactions.

"Now, I say to your Honor I do not care whether you believe Medeiros or do not believe Medeiros. I do not care if you sweep all of these affidavits except those two out of this case, I do not care if these men are guilty of this murder—Sacco and Vanzetti—this state cannot afford to execute men after a trial conducted in that way. There is something more important than punishing Sacco and Vanzetti for this murder, if they committed it, which we say they did not, and that is that the conviction of guilty men shall always be done under the rules of right and justice and fair dealing, openly and fairly, and without concealment or ulterior purpose. It is infinitely better that if these two men, Sacco and Vanzetti, are guilty of that murder that they should walk free tomorrow and be deported to Italy than it is that they should be executed with that mystery still unsolved. And I think when your Honor comes to reflect upon this transaction and upon the arguments that were used to you, sir, during the trial of that case on which you relied and on which you based your rulings, in the light of what has now taken place you cannot escape that conclusion. [4382] . . .

"This case started with a background of persecutions, intolerance, and unwillingness to give men a chance to believe in their minds what they wanted to, an impatience with men who did not believe in the great American prosperity and American ideals and standards, and in notions of common law and the protection of private property, which you and I, sir, know lie at the very foundation of civilization.

"But, if men are to be treated in this way for being mistaken, for being violently mistaken, for even being willing to use force—if you are going to treat them this way instead of having a few dozen Reds in one place or an-

other, a mere bubble on the surface of this great stream of nationality, you will have Reds multiplied by thousands, because there are a great many people who never take interest enough in any theoretical conception to believe it or disbelieve it as long as it remains a subject of debate and reason, but the instant they detect a sign of oppression, of tyranny and coercion, will adopt it and support it for no other reason than that.

"The quickest way to make this thing a running sore forever, the quickest way to make violence and trouble that never can be squelched in this country, is to give these people an opportunity to say that they have been oppressed and tyrannized over, that they have been made the victims of machination between the United States Government and the state, that there is evidence that would not be produced that would have acquitted them if it had been produced.

"Give them a chance. Let us see whether there is any such evidence. That chance is worth more to this state than the lives of Sacco and Vanzetti are worth to them." [4383]

Judge Thayer handed down his decision denying the motion on October 23d, 1926. That part of his opinion which deals with the Medeiros confession, as well as the criticisms of it contained in the brief on the appeal, is discussed at length in Part II, Chapter VII.

The Judge did not mention the alleged suppression of testimony, but devoted a large portion of his opinion to the issue concerning the Department of Justice. He charged counsel for the defendants with having created a mystery out of a hysteria, saying:

"Since the trial before the Jury of these cases, a new type of disease would seem to have developed. It might be called 'lego-psychic neurosis' or 'hysteria' which means: 'a belief in the existence of something which in fact and truth has no such existence.'

"This disease would seem to have reached a very dangerous condition, from the argument of counsel, upon the present Motion, when he charges Mr. Sargent, Attorney-General of the United States and his subordinates, and subordinates of Former-Attorney-General of the United States Mr. Palmer and Mr. Katzman and the District Attorney of Norfolk County, with being in a conspiracy to send these two defendants to the electric chair, not because they are murderers but because they are radicals. [4748] . . .

"If, then, a 'mystery' has been created in the resourceful mind of the distinguished counsel for the defendants, and if that 'mystery,' when developed at a new trial, might either help or hurt the defendants, it would be exceedingly difficult for this presiding Justice to find, as a fact, a collusion between these two great governments,—that of the United States and the Commonwealth of Massachusetts. These charges are of the greatest possible importance to American institutions. Although exceedingly painful to the Court, if it should allow these charges, if untrue, to go unnoticed and unchallenged, and to be broadcasted throughout the State, Nation, and foreign countries, with their tendency to inflame public opinion against these two great Governments, then this presiding Judge should be branded for all time to come a judicial coward, and unworthy of the high honor conferred upon him by this Commonwealth.

"It was argued that because of this 'mystery' a new trial should be granted, on the ground of public opinion in the interest of mankind. Cases cannot be decided on the ground of public opinion, but upon reason, judgment, and in according with law: for cases cannot be decided upon mystery, suspicion of propaganda but upon the actual evidence that is introduced at the trial. If this were otherwise, God help the poor defendants in criminal cases, if they are to be convicted or acquitted not upon the evidence and the law but upon public opinion, which might be formed as the result of an unwarranted public opinion or propaganda. [4750] . . .

"If the evidence might be neutral, or if it might hurt or help the defendants, then it is fairly clear that counsel does not know what the evidence is. And if this is true, how can the Court find that there is such evidence in existence of any conspiracy that can be produced? Nothing can be produced that has no present existence. In other words, the Court must now find facts of a fraudulent conspiracy between these Governments before a new trial can be granted. This request was an extraordinary one and would not seem to be reconcilable with the law." [4751]

The Judge maintained that with a little tact Mr. Thompson might have secured access to these files, and asserted that no evidence had been adduced of any fraudulent conspiracy to convict innocent men. He then reviewed some of the evidence at the trial and discussed the introducing of the issue of radicalism:

"Before the trial of these cases opened, at a conference with the Court, counsel were informed that the Court could see at that time no reason why radicalism should enter into the trial of these cases; but notwithstanding this fact counsel for the defendant, on three different occasions (either in cross-examination or by evidence introduced in chief), opened up the question of radicalism, which gave Mr. Katzman the right to cross-examine in regard thereto. Upon suggestion by the Court, counsel on both sides came to the bench and there were informed of the effect of their cross-examination and the evidence that they had introduced in chief, which gave Mr. Katzman the opportunity to cross-examine on this subject; and after this suggestion of the Court, counsel on both sides agreed that the questions and answers might be stricken from the record. Mr. Katzman, according to the record, was the moving party at least on one of these motions. If Mr. Katzman was particularly desirous of lugging into the trial of these cases unduly the subject of radicalism, would he be willing, on three different occasions to have the questions and answers stricken from the record? The conduct of Mr. Katzman on these four occasions is absolutely consistent with every other act of his during the entire trial of these cases. Perhaps on this matter it should be stated that the present counsel was not counsel for the defendants at the time of the trial on the indictments.

"There is another matter to which the Court desires to refer, which may bear upon the conduct of Mr. Katzman; it has, also, to do with the personal conduct of the Court and perhaps the Court may be pardoned for making this reference. At the close of the evidence, not a single request for instructions was handed in to the Court. If Mr. Katzman had been unfair during the trial, or if the Court were not fair and impartial, can anybody believe

that the able and skilful trial lawyers would pay, by their silent conduct, the almost unprecedented compliment to the Court of his fairness and impartiality? If District Attorney Katzman had been unfair, had not dealt squarely with the defendants, is it imaginable that requests for instructions to the Court covering the various matters concerning which he had been unfair would not have been submitted to the Court? Nor is this all. At the conclusion of the Charge, the record shows not a single exception was taken to that Charge. From the fact that no requests for instructions were handed in to the Court and not a single exception was taken to the Charge, it would seem as tho it ought to be [4767] fairly conclusive that these defendants had a fair and impartial trial." [4768]

Judge Thayer also discussed the reasons for the cross-examination of Sacco, quoting in this portion of his opinion, as from the record, two questions and answers, which in fact do not exist in the record.¹

k. The Appeal from the Denial of the Medeiros Motion

An appeal was promptly taken to the Supreme Judicial Court from this decision by Judge Thayer.

In his brief Mr. Thompson criticized the Judge's attitude on the issue of radicalism and concluded with a plea for special restraint on the part of the trial judge in a case such as this:

"For present purposes it is immaterial that the judicial traditions of this Commonwealth have been grossly violated by the Judge, or that he has brought into being an unprecedented menace to the character and reputation of any counsel whose only effort is loyally and conscientiously to represent and defend his clients. The point is that no judge would ever have been guilty of such a violation of judicial propriety except when laboring under excitement influenced by prejudice and personal hostility. And it is respectfully submitted that if there were no other objection than this to the 'Decision,' this incident alone would be sufficient to require this Court, in the interests of justice, to reverse the decision, and order a rehearing before another judge.

"It is believed that the spirit shown by the Judge in dealing with this motion [4859] is but a reflection of the still lingering public excitement caused by the campaign of Mitchel Palmer in 1920 against the so-called 'Reds.' [4860] . . . It is his duty to set his face sternly against it, and so far as he can to isolate the jury in a capital case from the prevailing currents of emotion and passion while they are performing the most serious function which a jury can perform. This the Judge utterly failed to do. His failure is neither lessened nor condoned by his occasional admonitions to the jury in general terms to treat the defendants fairly; and his attempt in his present 'Decision' to prove by those admonitions and otherwise that he did not permit his natural feelings of hostility to the radical views of the defendants to influence his conduct of the trial, and that he has not permitted those feelings to influence his decision of the present motion, is brought to naught

¹ These are quoted at page 464.

by the extremities to which he has obviously been driven to sustain his present conclusion, by his disregard of the agreed facts, by his excursion into matters withdrawn from his consideration by agreement of the parties, by his garbling of the evidence, and by the personal hostility which he now openly displays both to the defendants and to their present counsel. We recognize the serious implications of asking of this Court a review of an exercise of discretion by any trial judge; but there is another consideration which is even more serious, that unless some relief is afforded from the Judge's abuse of discretion in this case, two men believed to be innocent even by those most active in proving them guilty, and shown not to have had a fair trial, and not to have received from the Judge a fair and impartial consideration of their present application for relief, will lose their lives. The doubtful contingency of their receiving some executive clemency is no substitute for the full justice to which they are entitled, and would not redeem the administration of Justice from the stigma which these cases would leave upon it. This Court is the ultimate tribunal for the administration of justice according to law, and the defendants and their friends believe that in a situation such as is shown by the documentary evidence now submitted, this Court will give to them all the protection that the common law affords, not merely the protection of its technical rules, but the protection of that fundamental spirit of fairness upon which all lesser rules are based." [4861]

The argument of this appeal took place in Boston before Chief Justice Rugg and Justices Braley, Crosby, Pierce and Wait on January 27th and 28th, 1927. Three of these judges, Rugg, Braley and Wait, had sat on the first appeal.

Judge Wait wrote the opinion reported in 259 Mass. 128, handed down on April 5th, 1927. The Court held that Judge Thayer had not abused his discretion in refusing to believe Medeiros.¹ It rejected the claim that there had been misconduct on the part of the prosecution either in connection with the Department of Justice, or because testimony had been suppressed, justifying the Judge's decision as follows:

"He would be compelled to find that no substantial evidence appeared that the department of justice of the United States had in its control any proof of the innocence of these defendants, or had conspired to secure their conviction by wrongful means. The belief of investigators in the defendants' innocence is not evidence which can be submitted to a jury, and would not excuse failure on their part to furnish damaging evidence if they possessed it.

"He well might refuse to believe on this evidence that the prosecuting officers of the Southeastern District sought a conviction when they had in their control evidence which strongly tended to establish innocence. A prosecuting officer is violating no canon of legal ethics in presenting evidence which tends to show guilt, while failing to call witnesses, in whom he has no confidence, whose testimony contradicts what he is trying to prove. Nothing which he was in duty bound to disclose is shown to have been concealed by him." [4893]

Several of the points decided by the Supreme Judicial Court have been the subject of comment and criticism.

¹ This part of the opinion is quoted in Part II, Chapter VII, p. 529.

Judge Thayer had been asked to rule that, if the newly discovered evidence was of such a nature that a jury would be justified in convicting Medeiros or any member of the Morelli gang for the Braintree murders, then the defendants were entitled to a new trial. The prosecution had admitted that if Medeiros had participated in that crime then the defendants were innocent of it; an admission which would seem to make the requested ruling logically necessary. Judge Thayer having determined that, as a matter of fact, Medeiros was not to be believed, he may have felt that the ruling was academic. Nevertheless defendants were entitled to correct legal rulings; and they made the judge's refusal to make the ruling one of their points on the appeal.

The Supreme Judicial Court upheld him:

"The law in regard to motions for new trial based upon newly discovered evidence is fully and accurately stated in *Davis v. Boston Elevated Railway*, 235 Mass. 482. Further discussion is unnecessary. The principles therein stated are controlling. [4888]

"That case declares, page 496: ' . . . it is not imperative that a new trial be granted even though the evidence is newly discovered, and, if presented to a jury, would justify a different verdict.' There was no error in refusing to give the eighth request. The rule is the same even though the case is capital. *Commonwealth v. Devereaux*, *supra*. *Commonwealth v. Madeiros*, 257 Mass. 1." [4889]

The decision in the *Davis* case here relied on by the Supreme Judicial Court rested chiefly on the interest of the community in the termination of litigation. It was for this reason the court had ruled in that case that the discretion of the trial judge should not be interfered with. That a rule similar to this should obtain in a capital case had never before been decided. The two cases cited by the Court in the Sacco case as authority for the conclusion that the rule is the same in civil and in criminal cases do not actually establish this proposition. The Madeiros appeal involved only an ordinary matter of procedure, in which, of course, there would be no reason for any difference. In the Devereaux case such a general rule was indeed stated; but it was applied only to a matter of secondary importance.

That in a capital case a new trial should be denied when the court believes a jury would be justified in acquitting on new evidence is inconceivable. Should such a situation ever arise it is hardly likely that the Supreme Judicial Court would consider itself bound by the statement in the Sacco case. No doubt it would hold that this statement, not having been necessary to the decision, was "obiter dictum" and not controlling. That the Court was swayed by the nature of the case into stretching the rule of law is a conclusion which cannot be avoided. Not many years earlier the same court had indicated that the "overwhelming force" of the evidence for the Commonwealth should be the determining factor in refusing a new trial in a criminal case. (*Commonwealth v. Dascalakis*, 246 Mass. 12.) However, it is the trial judge who must pass on this question, not the appellate court; and that

court has practically never decided that a trial judge's decision has been an abuse of his discretion.

The Supreme Judicial Court, in upholding the failure of the prosecution to call the two young women, Hayes and Kennedy, originally said it was proper for a prosecuting officer not to call witnesses "in whom he has no confidence *or* whose testimony contradicts what he is trying to prove." The inclusion of the disjunctive "or" justified the prosecution since, although the reliability of the two young women had never been questioned, they would have contradicted Levangie's story that the driver of the car was Vanzetti. This language allowed the interpretation, however, that the Court would condone the suppression of evidence. And it was perhaps inconsistent with the Court's statement in the opinion on the appeal from the judgment of conviction: "There was nothing to show that the Commonwealth was suppressing evidence." [4328]. When officially published the opinion left out the disjunctive "or," thus justifying the failure to call witnesses only if the prosecutor had no confidence in them. In its final form, the opinion frees itself from criticism, but it then no longer sustains the position of the prosecution in this case. Since Mr. Katzmänn had never questioned the accuracy of the two young women it would seem that his refusal to call them merely because they tended to contradict what he was trying to prove should now have been held improper. The Court laid down in the first draft of its opinion a rule of law which supports its own decision, a rule that was, however, open to criticism; it finally modified the rule but it let the decision, the result of the original rule, stand.

IV

SENTENCE OF DEATH

- a. Imposition of Sentence.
- b. Application for Clemency.
- c. Proceedings before Governor Fuller and the Advisory Committee.
- d. The Report of Governor Fuller.
- e. The Report of the Lowell Committee.
- f. Last Legal Steps.

a. Imposition of Sentence

As no other moves remained open to the defendants in the courts of Massachusetts the District Attorney moved that sentence be imposed. This was done by Judge Thayer on April 9th, 1927. Sacco and Vanzetti made statements in answer to the clerk's question whether they had "anything to say why sentence of death should not be passed":

"Statement by Nicola Sacco

"Yes, sir. I am not an orator. It is not very familiar with me the English language, and as I know, as my friend has told me, my comrade Vanzetti will speak more long, so I thought to give him the chance.

"I never know, never heard, even read in history anything so cruel as this Court. After seven years prosecuting they still consider us guilty. And these gentle people here are arrayed with us in this court today.

"I know the sentence will be between two class, the oppressed class and the rich class, and there will be always collision between one and the other. We fraternize the people with the books, with the literature. You persecute the people, tyrannize over them and kill them. We try the education of people always. You try to put a path between us and some other nationality that hates each other. That is why I am here today on this bench, for having been the oppressed class. Well, you are the oppressor.

"You know it, Judge Thayer,—you know all my life, you know why I have been here, and after seven years that you have been persecuting me and my poor wife, and you still today sentence us to death. I would like to tell all my life, but what is the use? You know all about what I say before, and my friend—that is, my comrade—will be talking, because he is more familiar with the language, and I will give him a chance. My comrade, the man kind, the kind man to all the children, you sentence him two times, in the Bridgewater case and the Dedham case, connected with me, and you

know he is innocent. You forget all the population that has been with us for seven years, to sympathize and give us all their energy and all their kindness. You do not care for them. Among that peoples and the comrades and the working class there is a big legion of intellectual people which have been with us for seven years, but to not commit the iniquitous sentence, but still the Court goes ahead. And I think I thank you all, you peoples, my comrades who have been with me for seven years, with the Sacco-Vanzetti case, and I will give my friend a chance.

"I forgot one thing which my comrade remember me. As I said before, Judge Thayer know all my life, and he know that I am never been guilty, never,—not yesterday nor today nor forever." [4896]

"Statement by Bartolomeo Vanzetti"

"Yes. What I say is that I am innocent, not only of the Braintree crime, but also of the Bridgewater crime. That I am not only innocent of these two crimes, but in all my life I have never stole and I have never [4896] killed and I have never spilled blood. That is what I want to say. And it is not all. Not only am I innocent of these two crimes, not only in all my life I have never stole, never killed, never spilled blood, but I have struggled all my life, since I began to reason, to eliminate crime from the earth.

"Everybody that knows these two arms knows very well that I did not need to go in between the street and kill a man to take the money. I can live with my two arms and live well. But besides that, I can live even without work with my arm for other people. I have had plenty of chance to live independently and to live what the world conceives to be a higher life than not to gain our bread with the sweat of our brow.

"My father in Italy is in a good condition. I could have come back in Italy and he would have welcomed me every time with open arms. Even if I come back there with not a cent in my pocket, my father could have give me a possession, not to work but to make business, or to oversee upon the land that he owns. He has wrote me many letters in that sense, and other well to do relatives have wrote me many letters in that sense that I can produce.

"Well, it may be a boast. My father and my uncle can boast themselves and say things that people may not be compelled to believe. People may say they may be poor when I say that they are to consider to give me a position every time that I want to settle down and form a family and start a settled life. Well, but there are people maybe in this same court that could testify to what I have say and what my father and my uncle have say to me is not a lie, that really they have the means to give me position every time that I want.

"Well, I want to reach a little point farther, and it is this,—that not only have I not been trying to steal in Bridgewater, not only have I not been in Braintree to steal and kill and have never steal or kill or spilt blood in all my life, not only have I struggled hard against crimes, but I have refused myself the commodity or glory of life, the pride of life of a good position, because in my consideration it is not right to exploit man. I have refused to go in business because I understand that business is a speculation on profit upon certain people that must depend upon the business man,

and I do not consider that that is right and therefore I refuse to do that.

"Now, I should say that I am not only innocent of all these things, not only have I never committed a real crime in my life—though some sins but not crimes—not only have I struggled all my life to eliminate crimes, the crimes that the official law and the official moral condemns, but also the crime that the official moral and the official law sanctions and sanctifies,—the exploitation and the oppression of the man by the man, and if there is a reason why I am here as a guilty man, if there is a reason why you in a few minutes can doom me, it is this reason and none else.

"I beg your pardon. [Referring to paper.] There is the more good [4897] man I ever cast my eyes upon since I lived, a man that will last and will grow always more near and more dear to the people, as far as into the heart of the people, so long as admiration for goodness and for sacrifice will last. I mean Eugene Debs. I will say that even a dog that killed the chickens would not have found an American jury to convict it with the proof that the Commonwealth produced against us. That man was not with me in Plymouth or with Sacco where he was on the day of the crime. You can say that it is arbitrary, what we are saying, that he is good and he applied to the other his own goodness, that he is incapable of crime, and he believed that everybody is incapable of crime.

"Well, it may be like that but it is not, it could be like that but it is not, and that man has a real experience of court, of prison and of jury. Just because he want the world a little better he was persecuted and slandered from his boyhood to his old age, and indeed he was murdered by the prison. He know, and not only he but every man of understanding in the world, not only in this country but also in the other countries, men that we have provided a certain amount of a record of the times, they all still stick with us, the flower of mankind of Europe, the better writers, the greatest thinkers of Europe, have pleaded in our favor. The scientists, the greatest scientists, the greatest statesmen of Europe, have pleaded in our favor. The people of foreign nations have pleaded in our favor.

"Is it possible that only a few on the jury, only two or three men, who would condemn their mother for worldly honor and for earthly fortune; is it possible that they are right against what the world, the whole world has say it is wrong and that I know that it is wrong? If there is one that I should know it, if it is right or if it is wrong, it is I and this man. You see it is seven years that we are in jail. What we have suffered during these seven years no human tongue can say, and yet you see me before you, not trembling, you see me looking you in your eyes straight, not blushing not changing color, not ashamed or in fear.

"Eugene Debs say that not even a dog—something like that—not even a dog that kill the chickens would have been found guilty by American jury with the evidence that the Commonwealth have produced against us. I say that not even a leprous dog would have his appeal refused two times by the Supreme Court of Massachusetts—not even a leprous dog.

"They have given a new trial to Madeiros for the reason that the Judge had either forgot or omitted to tell the jury that they should consider the man innocent until found guilty in the court, or something of that sort. That man has confessed. The man was tried and has confessed, and the court give him another trial. We have proved that there could not have been another

Judge on the face of the earth more prejudiced and more cruel than you have been against us. We have proven that. Still they refuse the new trial. We know, and you know in your heart, that you have been against us from the very beginning, before you see us. [4898] Before you see us you already know that we were radicals, that we were underdogs, that we were the enemy of the institution that you can believe in good faith in their goodness—I don't want to condemn that—and that it was easy on the time of the first trial to get a verdict of guiltiness.

"We know that you have spoke yourself and have spoke your hostility against us, and your despisement against us with friends of yours on the train, at the University Club of Boston, on the Golf Club of Worcester, Massachusetts. I am sure that if the people who know all what you say against us would have the civil courage to take the stand, maybe your Honor—I am sorry to say this because you are an old man, and I have an old father—but maybe you would be beside us in good justice at this time.

"When you sentenced me at the Plymouth trial you say, to the best of my memory, of my good faith, that crimes were in accordance with my principle,—something of that sort,—and you take off one charge, if I remember it exactly, from the jury. The jury was so violent against me that they found me guilty of both charges, because there were only two. But they would have found me guilty of a dozen charges against your Honor's instructions. Of course I remember that you told them that there was no reason to believe that if I were the bandit I have intention to kill somebody, so that they will take off the indictment of attempt to murder. Well, they found me guilty of what? And if I am right, you take out that and sentence me only for attempt to rob with arms,—something like that. But, Judge Thayer, you give more to me for that attempt of robbery than all the 448 men that were in Charlestown, all of those that attempted to rob, all those that have robbed, they have not such a sentence as you gave me for an attempt at robbery.

"I am willing that everybody that does believe me that they can make commission, they can go over there, and I am very willing that the people should go over there and see whether it is true or not. There are people in Charlestown who are professional robbers, who have been in half the prisons of the United States, that they are steal, or hurt the man, shoot him. By chance he got better, he did not die. Well, the most of them guilty without trial, by self-confession, and by asking the aid of their own partner, and they got 8 to 10, 8 to 12, 10 to 15. None of them has 12 to 15, as you gave me for an attempt at robbery. And besides that, you know that I was not guilty. You know that my life, my private and public life in Plymouth, and wherever I have been, was so exemplary that one of the worst fears of our prosecutor Katzmann was to introduce proof of our life and of our conduct. He has taken it off with all his might and he has succeeded.

"You know if we would have Mr. Thompson, or even the brother McAnarney, in the first trial in Plymouth, you know that no jury would have found me guilty. My first lawyer has been a partner of Mr. Katzmann, as he is still now. My first lawyer of the defense, Mr. Vahey, has [4899] not defended me, has sold me for thirty golden money like Judas sold Jesus Christ. If that man has not told to you or to Mr. Katzmann that he know that I was guilty, it is because he know that I was not guilty. That man has done everything indirectly to hurt us. He has made long speech with the jury

about things that do matter nothing, and on the point of essence to the trial he has passed over with few words or with complete silence. This was a pre-meditation in order to give to the jury the impression that my own defender has nothing good to say, has nothing good to urge in defense of myself, and therefore go around the bush on little things that amount to nothing and let pass the essential points either in silence or with a very weakly resistance.

"We were tried during a time that has now passed into history. I mean by that, a time when there was hysteria of resentment and hate against the people of our principles, against the foreigner, against slackers, and it seems to me—rather, I am positive of it, that both you and Mr. Katzmman has done all what it were in your power in order to work out, in order to agitate still more the passion of the juror, the prejudice of the juror, against us.

"I remember that Mr. Katzmman has introduced a witness against us, a certain Ricci. Well, I have heard that witness. It seems that he has nothing to say. It seemed that it was foolishness to produce a witness that has nothing to say. And it seemed if he were called by the Commonwealth to tell to the jury that he was the foreman of that laborer that was near the scene of the crime and who claimed, and it was testified in our behalf, that we were not the men and that this man, the witness Ricci, was his foreman, and he has tried to keep the man on the job instead of going to see what was happening so as to give the impression that it was not true that the man went towards the street to see what happened. But that was not very important. The real importance is that that man say that it was not true. That a certain witness that was the water boy of the gang of the laborers testified that he take a pail and go to a certain spring, a water spring, to take water for the gang—it was not true that he go to that spring, and therefore it was not true that he see the bandit, and therefore it was not true that he can tell that neither I nor Sacco were the men. But it was introduced to show that it was not true that that man go to that spring, because they know that the Germans has poisoned the water in that spring. That is what he say on that stand over there.¹ Now, in the world chronicle of the time there is not a single happening of that nature. Nobody in America—we have read plenty things bad that the Germans have done in Europe during the war, but nobody can prove and nobody will say that the Germans are bad enough to poison the spring water in this country during the war.

"Now, this, it seems, has nothing to do with us directly. It seems to be a thing by incident on the stand between the other thing that is the essence here. But the jury were hating us because we were against the [4900] war, and the jury don't know that it makes any difference between a man that is against the war because he believes that the war is unjust, because he hate no country, because he is a cosmopolitan, and a man that is against the war because he is in favor of the other country that fights against the country in which he is, and therefore a spy, and he commits any crime in the country in which he is in behalf of the other country in order to serve the other country. We are not men of that kind. Katzmman know very well that. Katzmman know that we were against the war because we did not believe in the purpose for which they say that the war was done. We believe it that the war is wrong, and we believe this more now after ten years that we understood it day by day,—the consequences and the result of the after war. We believe more now than ever that the war was wrong, and we are against war more

¹ See p. 74.

now than ever, and I am glad to be on the doomed scaffold if I can say to mankind, 'Look out; you are in a catacomb of the flower of mankind. For what? All that they say to you, all that they have promised to you—it was a lie, it was an illusion, it was a cheat, it was a fraud, it was a crime. They promised you liberty. Where is liberty? They promised you prosperity. Where is prosperity? They have promised you elevation. Where is the elevation?'

"From the day that I went in Charlestown, the misfortune, the population of Charlestown has doubled in number. Where is the moral good that the War has given to the world? Where is the spiritual progress that we have achieved from the War? Where are the security of life, the security of the things that we possess for our necessity? Where are the respect for human life? Where are the respect and the admiration for the good characteristics and the good of the human nature? Never as now before the war there have been so many crimes, so many corruptions, so many degeneration as there is now.

"In the best of my recollection and of my good faith, during the trial Katzmann has told to the jury that a certain Coacci has brought in Italy the money that, according to the State theory, I and Sacco have stole in Braintree. We never steal that money. But Katzmann, when he told that to the jury, he know already that that was not true. He know already that that man was deported in Italy with the Federal policeman after our arrest. I remember well that the Federal policeman with him in their possession—that the Federal policeman has taken away the trunks from the very boarding where he was, and bring the trunks over here and look them over and found not a single money.

"Now, I call that murder, to tell to the jury that a friend or comrade or a relative or acquaintance of the charged man, of the indicted man, has carried the money to Italy, when he knows it is not true. I can call that nothing else but a murder, a plain murder.

"But Katzmann has told something else also against us that was not true. If I understand well, there have been agreement of counsel during the trial in which the counsel of defense shall not produce any evidence of [4901] my good conduct in Plymouth and the counsel of the prosecution would not have let the jury know that I was tried and convicted another time before in Plymouth.¹ Well, I call that a one-sided agreement. In fact, even the telephone poles knew at the time of this trial at Dedham that I was tried and convicted in Plymouth; the jurymen knew that even when they slept. On the other side the jury have never seen I or Sacco and I think they have the right to incline to believe that the jury have never approached before the trial anyone that was sufficiently intimate with me and Sacco to be able to give them a description of our personal conduct. The jury don't know nothing about us. They have never seen us. The only thing that they know is the bad things that the newspaper have say when we were arrested and the bad story that the newspaper have say on the Plymouth trial.

"I don't know why the defense counsel have made such an agreement, but I know very well why Katzmann has made such agreement, because he know that half of the population of Plymouth would have been willing to come over here and say that in seven years that I was living amongst them that I was never seen drunk, that I was known as the most strong and steadfast

¹ See pp. 68, 69.

worker of the community. As a matter of fact I was called a mule and the people that know a little better the condition of my father and that I was a single man, much wondered at me and say, 'Why you work like a mad man in that way when you have no children and no wife to care about?'

"Well, Katzmänn should have been satisfied on that agreement. He could have thanked his God and estimate himself a lucky man. But he was not satisfied with that. He broke his word and he tell to the jury that I was tried before in this very court. I don't know if that is right in the record, if that was take off or not, but I hear with my ear. When two or three women from Plymouth come to take the stand, the woman reach that point where this gentleman sit down over there, the jury were sit down in their place, and Katzmänn asked this woman if they have not testified before for Vanzetti, and they say, yes, and he tell to them, 'You cannot testify.' They left the room. After that they testified just the same. But in the meanwhile he tell to the jury that I have been tried before. That I think is not to make justice to the man who is looking after the true, and it is a frameup with which he has split my life and doomed me.

"It was also said that the defense has put every obstacle to the handling of this case in order to delay the case. That sound weak for us, and I think it is injurious because it is not true. If we consider that the prosecution, the State, has employed one entire year to prosecute us, that is, one of the five years that the case has last was taken by the prosecution to begin our trial, our first trial. Then the defense make an appeal to you and you waited, or I think that you were resolute, that you had the resolute in your heart when the trial finished that you will refuse every appeal that we will put [4902] up to you. You waited a month or a month and a half and just lay down your decision on the eve of Christmas—just on the evening of Christmas. We do not believe in the fable of the evening of Christmas, neither in the historical way nor in the church way. You know some of our folks still believe in that, and because we do not believe in that, it don't mean that we are not human. We are human, and Christmas is sweet to the heart of every man. I think that you have done that, to hand down your decision on the evening of Christmas, to poison the heart of our family and of our beloved. I am sorry to be compelled to say this, but everything that was said on your side has confirmed my suspicion until that suspicion has changed to certitude. So that you see that one year it has taken before trying us.

"Then the defense, in presenting the new appeal, has not taken more time than you have taken in answer to that. Then there came the second appeal, and now I am not sure whether it is the second appeal or the third appeal where you wait eleven months or one year without an answer to us, and I am sure that you have decided to refuse us a new trial before the hearing for the new appeal began. You take one year to answer it, or eleven months,—something like that. So that you see that out of the five years, two were taken by the State from the day of our arrest to the trial, and then one year to wait for your answer on the second or the third appeal.

"Then on another occasion that I don't remember exactly now, Mr. Williams was sick and the things were delayed not for fault of the defense but on account of the fault of the prosecution. So that I am positive that if a man take a pencil in his hand and compute the time taken by the prosecution in prosecuting the case, and the time that was taken by the defense to defend

this case, the prosecution has taken more time than the defense, and there is a great consideration that must be taken in this point, and it is that my first lawyer betrayed us,—the whole American population were against us. We have the misfortune to take a man from California,¹ and he came here, and he was ostracized by you and by every authority, even by the jury, and is so much so that no part of Massachusetts is immune from what I would call the prejudice,—that is, to believe that each people in each place of the world, they believe to be the better of the world, and they believe that all the other are not so good as they. So of course the man that came from California into Massachusetts to defend two of us, he must be licked if it is possible, and he was licked all right. And we have our part too.

“What I want to say is this: Everybody ought to understand that the first of the defense has been terrible. My first lawyer ² did not stick to defend us. He has made no work to collect witnesses and evidence in our favor. The record in the Plymouth Court is a pity. I am told that they are almost one-half lost. So the defense had a tremendous work to do in order to collect some evidence, to collect some testimony to offset and [4903] to learn what the testimony of the State has done. And in this consideration it must be said that even if the defense take double time of the State without delay, double time that they delay the case it would have been reasonable, whereas it took less than the State.

“Well, I have already say that I not only am not guilty of these two crimes, but I never commit a crime in my life.—I have never steal and I have never kill and I have never spilt blood, and I have fought against the crime, and I have fought and I have sacrificed myself even to eliminate the crimes that the law and the church legitimate and sanctify.

“This is what I say: I would not wish to a dog or to a snake, to the most low and misfortunate creature of the earth—I would not wish to any of them what I have had to suffer for things that I am not guilty of. But my conviction is that I have suffered for things that I am guilty of. I am suffering because I am a radical and indeed I am a radical; I have suffered because I was an Italian, and indeed I am an Italian; I have suffered more for my family and for my beloved than for myself; but I am so convinced to be right that if you could execute me two times, and if I could be reborn two other times, I would live again to do what I have done already.

“I have finished. Thank you.

“THE COURT. Under the law of Massachusetts the jury says whether a defendant is guilty or innocent. The Court has absolutely nothing to do with that question. The law of Massachusetts provides that a Judge cannot deal in any way with the facts. As far as he can go under our law is to state the evidence.

“During the trial many exceptions were taken. Those exceptions were taken to the Supreme Judicial Court. That Court, after examining the entire record, after examining all the exceptions,—that Court in its final words said, ‘The verdicts of the jury should stand; exceptions overruled.’ That being true, there is only one thing that this Court can do. It is not a matter of discretion. It is a matter of statutory requirement, and that being true

¹ Moore.

² Vahey.

there is only one duty that now devolves upon this Court, and that is to pronounce the sentences.

"First the Court pronounces sentence upon Nicola Sacco. It is considered and ordered by the Court that you, Nicola Sacco, suffer the punishment of death by the passage of a current of electricity through your body within the week beginning on Sunday, the tenth day of July, in the year of our Lord, one thousand, nine hundred and twenty-seven. This is the sentence of the law.

"It is considered and ordered by the Court that you, Bartolomeo Vanzetti—

MR. VANZETTI. Wait a minute, please, your Honor. May I speak for a minute with my lawyer, Mr. Thompson?

MR. THOMPSON. I do not know what he wants to say. [4904]

THE COURT. I think I should pronounce the sentence.—Bartolomeo Vanzetti, suffer the punishment of death—

MR. SACCO. You know I am innocent. That is the same words I pronounced seven years ago. You condemn two innocent men.

THE COURT. —by the passage of a current of electricity through your body within the week beginning on Sunday, the tenth day of July, in the year of our Lord, one thousand nine hundred and twenty-seven. This is the sentence of the law.

We will now take a recess.

[At 11.00 A.M., the Court adjourned without day.]” [4905]

b. Application for Clemency

Formal application for clemency was made on behalf of the condemned men to the Governor of Massachusetts, Alvan T. Fuller, by Messrs. Thompson and Ehrmann in a letter dated May 4th, 1927, accompanied by a petition signed by Vanzetti but not by Sacco. This failure of Sacco to sign was explained on the ground that when the petition was discussed with him, he exhibited symptoms similar to those he had shown in 1923 when committed to the Bridgewater Hospital. Counsel stated that the petition had been read to him, and that he had expressed his agreement with it, but that he had refused to sign it because, as counsel wrote, “his principles forbade him to sign any paper not addressed to the ‘people,’ by which we understood him to mean the working classes” [4907]. The letter also called attention to certain of his remarks which bore witness to his complete discouragement:

“that he had no more hope in any efforts that might be made on his behalf; that he felt sure that every department of the Government was determined upon his death; and that he believed that if he were dead and out of the way, that might relieve the suffering of his wife, in whom prolonged anxiety and worry might, he feared, result in a nervous collapse or something worse. In a word, he seems to be in a condition of complete dejection and despair.” [4908]

Various affidavits and statements dealing with the conduct of Judge Thayer were submitted with the petition. The details of these are considered in the chapter of this book which is devoted to the attitude of the Judge.¹

Vanzetti's petition began as follows:

"Dedham Jail, May 3, 1927.

"To the Governor and Council of Massachusetts.

"We, Bartolomeo Vanzetti and Nicola Sacco, confined in the jail at Dedham under sentence of death after conviction of the crime of murder in the first degree, hereby pray you to exercise the power conferred upon you by the Constitution of Massachusetts publicly to investigate all the facts of our cases and set us free from that sentence, if the findings will so dictate to your understanding and conscience. We deem the faculty of compassion to be one of the highest of the human attributes, but here we are asking not for mercy but for justice, and this is the reason why we have not used the printed form provided for petitions of this nature. It contains the word 'pardon,' which we are unwilling to use, although our counsel has assured us that it does not necessarily mean forgiveness or convey the idea of a confession of guilt. But we wish the utmost possible clearness and precision on this point and are unwilling to risk being misunderstood.

"We are not sufficiently familiar with your language to express clearly the ideas we want to express. For that reason we have asked our counsel to help us with our English; but it should be remembered that the thoughts are our own.

"Our counsel has warned us that what we have to say may deepen the prejudice against us; but we are foremostly concerned to save what no human power except ourselves can deprive us of, our faith and our dignity, since we have already been deprived of almost all of what men can deprive men.

"We have been told that Your Excellency stands and has always stood for honesty in public and private life as you understand it, and that you have a mind free and not in legalistic bonds. So, since the nature of each human being is common with the fundamental nature of mankind, and consequently the sentiment of justice is fundamentally common to all men, we can safely speak to you as man to man, notwithstanding deep differences of opinion which divide us.

"Our present request is made first and foremost on the ground of our innocence. We had nothing whatever to do with the South Braintree crime. Our instincts make us abhor and our principles condemn such a crime.

"We understand that it would be most improper for us to argue our case here at length; we know that your burden is heavy; yet we pray you to forgive us the necessity of stating the fundamental facts and reasons upon which our prayer must be based. It is not our fault if they are many, grave, and strong. [4910]

"We call your attention to the undisputed facts that at the time of the crime, after it, and ever since we had come to this country, we had earned our own living with hard work; that one of us was able to make large wages and to accumulate a substantial savings bank deposit; that the other could easily

¹ See pp. 535-543.

have done the same were it not that being single and of a well-to-do family he thought more to give than to save; and that both of us could have had an independent position in Italy regardless of our earnings here. We find that Americans know little of Italian social conditions. For that reason you will forgive us if we say that one of us, Vanzetti, comes of an old, respected, and well-to-do family in Piedmont, northern Italy; and that the other, Sacco, comes of a family in Torre Maggiore, central Italy, near the Adriatic, which has been prominent in local affairs of government for many years, his brother having been mayor of Torre Maggiore, and several uncles members of the Town Council. The family is in comfortable circumstances. There was no economic necessity for either of us to come to this country. We came because we had heard that it was a land of freedom—freedom not merely to gain wealth, for which we cared little, but freedom of the mind and of ideas. We always think that a natural right, and in that is our happiness.” [4911]

After arguing some of the matters which had been before the courts Vanzetti made the charge that the trial had been unfair by reason of the attitude and prejudice of Judge Thayer. He said:

“Much has been said in praise of the fairness of the Judge who tried us. But we have learned to our sorrow that professions of fairness do not necessarily mean real fairness, and may cover an intention to use the great judicial power to secure a conviction which under the forms of law will stand. We understand that this power is called ‘discretion,’ and that the judge who uses his discretion to convict is beyond the reach of any other tribunal unless it can be proved that he was corrupt or irrational. We do not intend to enter here a criticism of your system of law. [4915] . . .

“From the very beginning of the trial the Judge stirred up the political, social, religious, and economic hatred of the jurors, and their fears and antagonism against us, but covered himself by admonitions to the jury from time to time to treat us fairly and impartially; so that we were really tried not for murder, but for being Radicals, draft evaders, and pacifists. Of course the Judge has many times denied this, but that that was his real attitude is conclusively shown by the affidavits which we are sending you with this request. . . .

“Can anyone bring himself honestly to believe that such persistent prejudice, hostility, and despisement as are disclosed in these affidavits did not affect the discretionary rulings of the Judge? Is it to be believed that the operation of such prejudice was interrupted at the moment of each discretionary ruling?” [4916]

Vanzetti then took up the question of consciousness of guilt. He pointed out that at the Plymouth trial for the Bridgewater crime he had been convicted because he had not testified, his counsel having advised him that if he did so testify his radicalism would be brought out against him and convict him, saying:

“It seems that if a Radical, when accused of crime, does not testify, that is enough to convict him; and if he [4918] does testify, his radicalism will convict him anyway, and also he is blamed for opening up the subject of radicalism. What is a Radical to do under these circumstances?” [4919]

He pointed out that his radical views must have influenced the jury against him and Sacco; that the jurors and even the judge believed anarchists to be wholly bad people; and that they had been therefore unable to do justice. He then appealed to the Governor to endeavor to understand his principles and Sacco's and accordingly set them forth:

"But now we are here in spirit before you, a man of conservative principles, supreme authority of a great state in its ethnic human meaning, to ask you justice. Should we try to hide from you our beliefs and faith; to sneak before you in order to avoid contrast and antagonism, and so to propitiate you in our behalf—and thus be cowards and unfair before you, mankind, and ourselves? We refer you to our words to Judge Thayer when we were sentenced, words that sprang extemporaneously from our very heart. And permit us to say that we believe that you yourself would disapprove if we now said anything else.

"We are anarchists, believers in anarchy, which is neither a sect nor a party, but a philosophy that like all the philosophies aims to human progress and happiness. Our goal is the ultimate elimination of every form of violence and the utmost freedom to each and all actuated by the elimination of every form of oppression and exploitation of the man by the man. Our sense and ideal of justice is based on the principle of man's self-respect and dignity; of the equality of men in their fundamental nature and in their rights and duties.

"We call ourselves Libertarians, which means briefly that we believe that human perfectibility is to be obtained by the largest amount of freedom, and not by coercion, and that the bad in human nature and conduct can only be eliminated by the elimination of its causes, and not by coercion or imposition, which cause greater evil by adding bad to bad. [4920]

"We are not so foolish as to believe or to advocate that human institutions be changed in a day. The change must be gradual. But we do believe that there ought to be a change, and that it should be in the direction of more freedom and not more coercion. That is where we are opposed to every theory of authoritarian communism and socialism; for they would rivet more or less firmly the chains of coercion on human spirit, just as we are opposed to the present system, which is based upon coercion.

"Such being our beliefs and goal, our policy is to ever stand against anything that is coercion, for we believe that only by freedom and by struggle for freedom does man acquire the capacity of freedom; and to ever stand against everything that is privilege, because privilege means masters and slaves, liberty to none, injustice, strife, and fratricide among men. It is for these beliefs that we are outlawed and made outcasts from the society of so many of our fellow men, with whom we might co-operate, and whom we do not want to hate.

"Our ideas are not new. In one form or another they have influenced human thought in the western world, and therefore history, for at least two thousand years. Among their modern champions are men such as William Godwin, Shelley, Carlo Pisacane, Proudhon, Reclus, Krapotkin, Bakunin, Tolstoi (in a sense), Flammarion, Malatesta, Galleani, and in your country Tucker, and other great intellects and hearts. The great philosopher Ernest Renan said that Christ was a 'political anarchist.'

"The term 'anarchy,' as your Excellency knows, means literally the absence of government, and 'anarchist' a disbeliever in government, and eventually in actual law. We admit it before the supreme authority of a great state (ethnically), even though it may cause us to appear monstrous to you; certainly to appear to most men dangerous criminals. Forgive us an explanation, which we could make entirely in the words of Thomas Jefferson, Thomas Paine, Ralph Waldo Emerson, Abraham Lincoln, Benjamin Franklin, and other great Americans. We know that to be free, man must be capable of freedom. But we also know that suddenly to eliminate every means of public defence would be to fall into chaos and destruction; that the actual laws are better than certain ones of the past because of the peoples' will. And, what is more, we do not intend to eliminate public and private defence, public legislation, etc., but to improve them and put them on a basis superior to the present. Nor do we intend to deface from human spirits the notion of rights and duties, but to make their full application possible. We cannot, in consideration of you, enter into details, or even attempt a synthetical explanation of our Credo. Just a quotation from Jefferson, which we make from memory, 'I am not yet prepared to say that where there is no written law, no regulated tribunal, there is not a law in our hearts and a power in our hands given for righteousness, employment in maintaining right and redressing wrong.'

"Consider, please, the positive side of that negation. How creative it [4921] is. If you care for a full bibliography of our Credo we submit to you the article in the Encyclopaedia Britannica by Peter Krapotkin; and if you wish to know the possibilities and criterions of our faith, we refer to the essays 'Politics' and 'The State' by Ralph Waldo Emerson.

"If we would stop here, hundreds would say to you, 'These two men are here for an atrocious crime of violence. They do disbelieve in private property and believe in violence. They are trying to be magniloquent and to take a Messianic attitude while silent as to the acts of violence and robberies committed by some "comrades" of their own.' But do not believe them. Men like that can say what they please without correction; for we are in prison, and this is our only chance to speak. We cannot deny that acts of violence have been committed by men calling themselves anarchists, and sometimes by men who had a right to call themselves that. But they were impelled by persecution and self-defence, or provoked by violence, oppression, and intolerance on the part of persons in power. They were moved by sincere intentions caused by their deep sensibility to the spectacle of human suffering, and by their feeling of helplessness to right in any other way the injustice inflicted upon them, their friends, and the people. In a word, it has been the violence of tyranny that has provoked the violence of the oppressed for self-defence.

"On principle we abhor violence, deeming it the worst form of coercion and authority. We are with Garibaldi, 'Only the slaves have the right to violence to free themselves; only the violence that frees is legitimate and holy.' We lived in this country twelve years before our arrest, industriously, honestly, and without any act of violence. The only violence that has been committed is the violence practiced against us and not by us. For many theories and acts that we deem wrong, which are justified in the name of our faith, we are not responsible. But we love and venerate our Cause, our Mar-

tyrs, our Heroes, our Masters. For this cause we are willing to suffer and to die, but not for the low and sordid South Braintree crime.

"We have no doubt that at the present time many will be found who secretly and behind closed doors will be willing to state as facts unverified rumors; to assure you that the evidence that might have been produced would have been conclusive against us; to furnish plausible explanations of the suppression and perversion of testimony and the other acts of unfairness to which we have called your attention; to offer you selected documents; to urge upon you that the prestige of your courts is more important than our lives; to whisper calumnies of ourselves and of our friends; and, in general, to do whatever can be done without fear of detection to injure us. Yet we are not aware that either the prosecuting officers or any of the persons who profess to desire our death solely in the interest of public justice have ever made any attempt to identify, apprehend, or punish our three supposed associates in this crime. We know that they gave our counsel no help or sympathy in their effort to show who really [4922] did commit the crime. To all such persons we say the time to produce your documents and your testimony, and to test your unverified rumors, was in open court, where they would have been subject to cross-examination and the scrutiny of our counsel. Your institutions are said to be based upon open and even-handed justice. That claim cannot be made good if secret communications are now permitted to take the place of public testimony. Nor can the prestige of your courts long survive the loss of respect which will be the certain result of unredressed injustice.

"For these reasons, and because we realize how much time and labor will be required to deal adequately with the matters to which we have called your attention, we respectfully urge you, if you doubt our statements, to cause a preliminary public investigation of our case to be made by able and disinterested men. The result cannot be convincing unless the investigation is public so that all may know what is said against us. But in saying this we would not have you believe that we are asking for mercy or for anything but justice; or that we would purchase our lives by the surrender of our principles or of our self-respect. Men condemned to die may be forgiven for plain speaking. We would not urge upon you anything that might seem disrespectful or incredible; but in the long run the victims of public injustice suffer less than the government that inflicts the penalty. We can die but once, and the pang of death will be but momentary; but the facts which show injustice cannot be obliterated. They will not be forgotten; and through the long years to follow they will trouble the conscience of those whose intolerance has brought us to our death, and of generations of their descendants. A mistake of justice is a tragedy. Deliberate injustice is an infamy.

"Governor Alvan T. Fuller, we have been in prison seven years charged with a crime we did not commit, awaiting the fate that every day came nearer and nearer. Perhaps you can imagine what this has meant to us. And do you realize what this has meant to Sacco's wife and children, and to Vanzetti's father and mother and family at home in Italy? It is the thought not of our own approaching death, but of the suffering of those near and dear to us in the seven years that have passed, and of the greater suffering to come, that is the cause of our bitter grief. And yet we ask you not for mercy but for justice. We will not impose their sufferings or our own upon

you. You cannot justly consider their suffering or ours as a ground for your official action, except that that suffering may seem to you a reason for giving the most careful and unprejudiced consideration to the two grounds of our prayer—that we are innocent and that our trial was unfair.”

(Signed) “BARTOLOMEO VANZETTI” [4923]

One of the documents submitted with the petition was a report made by Mrs. Lois Rantoul, who had attended the trial as representative of the Greater Boston Federation of Churches. She discussed the principal issues and came to the conclusion that there was insufficient testimony to justify conviction. In summing up the trial she said:

“Having I hope made clear how lacking in evidence directly relative to the crime the case for the prosecution was, the question immediately arises, and justly so, why then did 12 men convict Sacco and Vanzetti of murder in the first degree?

“In my opinion the reasons incomprehensible though they may seem, are as follows:—

- (1) Preconceived idea of guilt on the part of the Jurors
- (2) Attitude of Judge
- (3) Fact that defendants were draft evaders and so-called ‘Reds’
- (4) Fatal Bullet [4942] . . .

“Summed up the defendants Sacco and Vanzetti according to law were convicted on no evidence of identification, evidence of conscious guilt justly open to grave doubts and expert testimony which in itself was on one side paid to affirm and on the other paid to deny, and even as affirmative testimony was not sustained.

“As I stated in the beginning of my report the defendants Sacco and Vanzetti are in my opinion according to the requirements of our laws innocent.” [4945]

c. Proceedings before the Governor and the Committee

Although appointed on June 1st, the Lowell Committee did not begin its hearings until July 1st, partly because the end of the college year required the attention of Mr. Lowell and of Mr. Stratton, partly because time was required for a study of the record. Mr. Thompson and Mr. Ehrmann were present at the hearings and took part in the examination of all the witnesses with the exception of the jurors, Judge Thayer, Chief Judge Hall of the Superior Court and part of the examination of Mr. Katzmman. Record was kept of all the hearings, but the work was at first done by stenographers unaccustomed to court proceedings. For the most part no record was kept of the discussion between counsel and members of the Committee. Mr. Ranney, attended on behalf of the prosecution.

What occurred at the sessions at which defendants’ counsel were not permitted to be present was not made public or even disclosed to counsel. The latter were, therefore, obliged to argue their case on the prejudicial acts of Judge Thayer without knowing what he had said in his own defense and without an opportunity of cross-examining the jurors about their reaction

to the Judge's attitude. Apparently the Committee also interviewed the defendants themselves and likewise Medeiros without making, or at least publishing, any record of such interviews.

The hearings began on July 1st and lasted until July 21st. A few people who had been witnesses at the trials testified. In addition appeared Thomas McAnarney and his brother John W. McAnarney, who had been consulted during the trial, and also Mrs. Sacco. Numerous persons gave evidence about acts and statements of Judge Thayer; Messrs. Field and Hamilton testified on the subject of Captain Proctor; the two young women, Miss Hayes and Miss Kennedy, who had not been called at the trial, described the driver of the car. The Marquis Ferrante, Italian consul, gave his views of the trial and of the defendants; Lottie Packard Tattillo testified about her recognition of Sacco on the day of the crime. No one was examined in relation to the Medeiros confession, although the Committee interviewed Medeiros himself and heard the theories of James E. King, editor of the *Boston Transcript*, with regard to the movements of the escaping bandit car.

Mr. Katzmman, after having been secretly examined, consented to being questioned by Mr. Thompson and appeared twice for that purpose. His recollection of some of the details of the case was not very good. Asked about the attempt to connect Boda with the defendants, he said he thought Boda would have been able to give valuable information. He admitted it had been impossible to trace any of the stolen money to the defendants, also that he had known the men for radicals: "from the newspapers I knew that very well." The following discussion took place in regard to his cross-examination of Sacco:

"I will ask you my question again. You told Judge Thayer, did you not, in answering an objection of Mr. Moore's to your threatening Sacco about his radical newspaper articles, and similar subjects, that you wanted to test the sincerity of his radicalism?—I don't remember. The record will tell.

If you did say to Judge Thayer your reason for pressing this cross-examination—the kind I have indicated—was because you wished to be sure that Sacco was a genuine radical and not one who was only pretending to be a radical, that was not the correct reason?—I cannot tell you how much I knew about Mr. Sacco's political or economic beliefs. I had no interest in them.

You think that the jury had no interest in hearing about Sacco's radical efforts etc.?—I think the jury had one interest in Mr. Sacco and Vanzetti, and that was to find out in their direct examination whether it was the truth, and I tried to show to the jury it was not the truth.

What did you try to show the jury,—what Sacco's purpose was in going to Johnson's house and trying to get the car?—I cannot remember. I don't believe, as a matter of recollection, that we were trying to show any definite purpose, for instance, that they were going to commit another crime.

Is it not a fact, Mr. Katzmman, that there was no claim made by you at all in your argument that the purpose of these men in going to get that

car was otherwise than they stated, namely, the purpose to collect radical literature.—I don't think that is so. I think,—I hope I am not in error,—there were divergences in the explanation of Sacco and Vanzetti as to the specific purpose as they gave it—I recall that Mr. Vanzetti said his purpose was a double one,—that he wanted to visit a friend of his in East Bridgewater whose exact residence he did not know, and thereafter to go in this car to Plymouth to find some householder who would agree to secrete such literature as they might pick up and bring there. I think the question may well have been raised in the course of the trial as to whether it was necessary under the circumstances to be there." [5041]

On his own initiative President Lowell called GUADAGNI and BOSCO, both of whom had at the trial testified to Sacco's presence on April 15th, 1920, in Boston, and who had both fixed the date by reference to a dinner given on that day to an editor of the *Transcript*, a Mr. Williams. Mr. Lowell tried to get these witnesses to retract their testimony by pointing out to them that, according to two newspapers and the statement of the editor, Williams, himself, the dinner by which they fixed Sacco's presence had taken place, not in April, but in May. Guadagni after a time fell in with Mr. Lowell's suggestion, saying that another witness, Dentamore, had brought to his mind the connection between Sacco and the dinner, and that he, himself, had really merely followed Dentamore's lead, fallen in with his train of thought, so to speak, and that Mr. Lowell must be right, and he, himself, mistaken about the date of the dinner. Bosco, on the other hand, refused to be swayed by anything Mr. Lowell suggested and insisted that in the Italian newspaper, *La Notizia*, there was an account of the dinner of April 15th, as being of that date and no other. Bosco was directed to bring the files of the paper to the next session of the Committee. He did so; and the minutes of the hearings fail to show what the files disclosed. From subsequent correspondence of the editors of the Holt publication with Mr. Lowell and Messrs. Thompson and Ehrmann, however, it appears that the files of the newspaper, *La Notizia*, completely vindicated Bosco, and furthermore that the editor, Williams, upon being asked again about the dinner, also confirmed the witnesses in regard to its date. This episode is more fully treated in the chapter which deals with Sacco's alibi.¹

LOTTIE PACKARD TATTILLO, called by the prosecution, claimed to have seen Sacco outside the Rice & Hutchins factory on the morning of the shooting and said she had at once recognized him as a man with whom she had worked in 1908 in the same factory.² Her testimony was at times incoherent and she talked a great deal about attacks made on her character. The prosecution had known of her before the trial but had not put her on as a witness because they had not been able to check up the statement that Sacco had worked at Rice & Hutchins in 1908 and because there were rumors of her immorality.

¹ See pp. 488-496.

² See pp. 318-325.

JEREMIAH F. GALLIVAN, former Chief of Police of Braintree, testified about his activities in trying to locate the bandits. He stated his surprise at how some of the witnesses had changed their testimony, and expressed the opinion that Miss Packard was a nut.¹

Gallivan's most important testimony related to the cap found at the scene of the crime. It had been argued that this was Sacco's cap, one reason among others given for the contention being that there was a hole in its lining caused by the nail on which the defendant had been in the habit of hanging his caps in the factory. Gallivan testified that he himself had made this hole when he was looking for possible identifying marks inside the lining of the cap.²

Testimony was also given by an investigator for the defense in regard to the difficulty he encountered in trying to get people to give evidence for the defendants on account of the prejudice which existed against them because of their opinions.

The Italian consul, MARQUIS FERRANTE, expressed surprise at Mr. Katzmann's effort to bring out the views of the defendants. He remembered hearing a lady at the trial say the men ought to go to jail for their ideas. He had spoken with both defendants in jail and had not believed them murderers:

"Did you ever talk with Vanzetti?—I talked with Vanzetti. Sacco is in a state of mind of suspicion.

You are now talking of them as what they were before the trial?—Before the trial. Vanzetti was more calm.

(By Judge Grant.) Have you seen them since?—I have seen them several times in Dedham. One day last year, or two years ago, I was there. . . .

(By Mr. Thompson.) May I ask you this: You are a lawyer and you have a great deal to do. You are quite familiar with your people, you know them pretty well, you know them in society, you know them generally?—Yes, I see them every day.

What is your impression of Sacco and Vanzetti?—Mr. Thompson, I have talked with Vanzetti once in my life; I have talked with Sacco probably twice. Sacco, I have no objection to making the division about him, I say he is a very exalted man. He was talking me about Karl Marx and those men and what he found in it, and when a man has no education and begins to read that literature he gets an indigestion of it.

I meant more as being possible criminals. Did they impress you as being of a criminal nature or as men deluded?—I cannot say. When I was with these men I had not the impression I was talking with a murderer. That is a question of impression." [5249]

The last witness was heard on July 21st, 1927. This was ROSEN, who had been an alibi witness for Vanzetti. He did little more than reaffirm what he had said before. Mr. Thompson then informed the Committee that

¹ See p. 325.

² See Part II, Chapter III, pp. 379-381.

Boda, whose real name was Buda, was living in Italy and would come back if his expenses were paid and if it were arranged he should not be troubled by the Federal authorities.

GARDNER JACKSON, of the Defense Committee discussed the attitude of the Lowell Committee on publicity of its hearings at some length:

"(By Mr. Thompson.) Do you desire to say anything to the Committee on that subject? If you do, I think they will hear you.—If they know your views, I am sure they know my views. I feel that it will satisfy no one, no matter what the decision is, because no one will know what has gone on unless the entire record is spread open and arguments are heard publicly on the entire record. I quote quite—seeing as it is confidential—a managing editor of one of the Boston papers who told me Saturday night, "The reason that you have not succeeded in getting the truth of this case open is because you have not had a courageous newspaper in New England behind you. If you had a courageous newspaper you would have had open hearings and the world would have known what was going on," and he thinks it was a cardinal error to start these things as secret hearings, and I agree with him thoroughly.

I wanted you to have an opportunity to say whatever you desired, because I am counsel for Sacco and Vanzetti and not for the Committee. You speak independently and for the Committee and for this group of Italians. Of course, you have a right to say what you have to say.—Of course, this group of Italians, I will say very frankly, are getting more and more and more nervous all the time, because our only knowledge of what is transpiring here comes from the witnesses who call us up and say the Governor said so-and-so and so-and-so, statements that are so inflaming to them,—I mean, indicate such an attitude of mind on the part of the Governor, and such a lack of trust in the defense witnesses, and such a presumption in favor of anything against these two men, that they are really in a very aggravated condition, and I am frankly in a hard position down there myself trying to maintain an equal balance in our approach to the public and toward the problem in the whole.

(By Judge Grant.) You do know, do you not, that where any new evidence has been introduced of any sort, that Mr. Thompson and Mr. Ehrmann have been allowed to hear it?—No.

PRESIDENT LOWELL. Not only to hear it, but to cross-examine any witnesses.

MR. THOMPSON. Before this Committee.

Yes, I am speaking for our Committee.—Yes.

And wherever the defendants' counsel, Mr. Thompson and Mr. Ehrmann, had any new evidence to present, we disregarded entirely all technicalities or rules of evidence, and allowed them to put in any evidence which they thought would bear on the case, whether it would be legally admissible or not, we put no bars up against them in that way. I wanted you to understand that this Committee had adopted that rule from the start?—Yes, sir.

And that the District Attorney, when he appeared here, was, although

we did not compel him to do so, he was perfectly ready to be cross-examined by Mr. Thompson and Mr. Thompson did cross-examine [5241] him when he made a statement?—Yes. I was speaking specifically of the Governor.

You did not give me that impression. I thought you meant to include this Commission.—I did not mean to include you. This Committee—

You said you knew nothing of what had taken place because Mr. Thompson said his lips were sealed, but all the evidence has been taken down by Mr. Thompson's own stenographer as well as by the official court stenographer.

MR. THOMPSON. Not all of it, gentlemen, only recently.

JUDGE GRANT. All except the first day you have had copies given to you of everything.

MR. THOMPSON. I have not yet. I expect them.

(By President Stratton.) You addressed the Commission as 'you.' You said, 'You have made a cardinal error.'—I did not mean that. I do mean to say that this gentleman with whom I discussed this case, and with whom I agreed, did say just that, that you, as well as Governor Fuller, he thought had made a very cardinal error in not having the hearings public; and the one specific thing that I have heard discussed more than anything else was the fact that Judge Thayer was brought in here and that you did not allow Mr. Thompson to cross-examine Judge Thayer.

(By President Lowell.) Do you think that would have been a proper thing to do?—Yes, seeing as all the new evidence, or, at least, a major part of the new evidence that was brought in had to do with Judge Thayer himself, and he was the man—

Has there been any new evidence brought in on the subject of his misconduct at the trial?—Certainly there has been new evidence pertaining to his conduct at the trial, maybe not specifically as to his actions at the trial.

I mean, as to his actions at the trial.—But his state of mind, there has been new evidence to show what his state of mind was.

Have we not allowed all that evidence to be brought out?—Yes, you have.

(By Judge Grant.) And it was taken down?—Yes, sir.

(By Mr. Thompson.) Was your difficulty in not being allowed to cross-examine or to know what he said?—Well, that is all I mean; I did not mean to use the phrase 'cross-examination.'

I wish you would use language with considerable accuracy here.—I am sorry. All we feel is that, here was the man whom we consider to have been a very biased judge, and all this testimony was adduced to bear out our contention that he was biased, and he was brought in and we do not know what he said. We don't know whether he denied or affirmed the charges that have been brought against him, and we think that that is not quite fair to us. [5242]

(By Judge Grant.) You could see the disadvantage, in one way, of trying the case publicly to the newspapers?—Oh, yes.

That it would be an interminable proceeding. With no rules of evidence it might last years, because all sorts of statements could be put in, of any

nature or sort, and we are not sitting as a court. We are simply an advisory board for the purpose of hearing what is to be said on the matter, and therefore, if it were to be thrown open to the public, it would simply be an impossible proceeding.—I can understand your fear.

No, no. Not fear.—I don't mean fear; the fear of getting it drawn out, and so forth.

JUDGE GRANT. Impossible proceedings.

(By President Lowell.) You remember this, that our business is to find out the truth?—I appreciate that.

And that our business is not at all to hear a controversy between the parties?—Yes.

But to find the truth. You recognize we have no power to summons witnesses in here, and it would be very difficult for us to find the truth if what the witness said was going to be published in the papers. We could not get them before us and get them to tell the truth.—Well, sir, that is just really where I disagree with you, because I do not think men are half as apt to tell the truth when they know it is not going to be published as they are if they know it is going to be published.

I am not speaking about their telling lies, that is not it, but I am speaking about their coming up here at all and giving us their stories. We have had difficulty in getting people to come up here to speak to us and get their stories.—Yes, I can conceive of that point. I can see that point but I think the other point far overweighs it so infinitely that it seems to me that the very fact of privacy gives a chance for a man who has an ax to grind of one sort or another to grind it.

(By President Lowell.) We do not find that they have axes to grind.—I find many of them." [5243]

Arguments were made before the Committee on July 25th, 1927. In concluding his presentation of the case Mr. Thompson said:

"The ablest men in Massachusetts who respect the courts are forced into a corner. We have got either to make some explanation that won't be accepted and that really can't commend itself to our own judgment as sincere, candid and fair, or else we have got to admit that this trial was a mistake and a miscarriage of justice, that it was unfairly conducted, that there was a reasonable doubt, which has been enormously increased since, and that our courts have been unable to correct the error then made, and therefore the Governor should pardon these men, whether or not you now believe they are guilty, whether or not you think that in five years from now the evidence would be stronger against them or weaker against them. The day has gone by, the State has had its chance, the trial has occurred. These arguments have all taken place. The courts have finished, and this is the result of this case.

"You are the only people now standing between Sacco and Vanzetti and the electric chair. It may be the Governor has done his best. 'He has seen all the witnesses, though in secret. We don't know what really occurred before him. But he is not a lawyer; he is not trained; he is not here for the purpose of assuming the burden which he has in part, at least, delegated to you. You

are trained men, you are supposed to be competent to judge matters of this kind; you have a most solemn duty to perform, even if the lives of these two men were worthless, even if their lives counted for nothing. It is the accountability of the State of Massachusetts to the entire civilized world that is at stake here, whether we shall stand up in our boots and say, 'Yes, we have made an awful blunder, but we shall see that it never happens again; we will see that measures are taken to prevent a recurrence of such a thing as this. But we do not intend to run to cover. We will admit our mistake; we will admit that our courts have fallen down and failed, owing partly to things for which they are not responsible, but they have failed. These men are going free. Let them be deported, but we will never execute men who were tried before a judge who called them foul names while the trial was going on and afterwards, who abused their counsel without provocation who misstated the evidence, who invented quotations which never occurred of the testimony of one of these defendants, and against whom the things can be said that have been said without the possibility of successful contradiction.'

"Now I am through with this case. I have done the best I could with it. I have labored here for years to try to bring about elementary justice, and if I fail I shall feel bitterly disappointed but not remorseful. I have [5333] done what I could, and I ask you to do what you can to prevent what, if not prevented, will be to the everlasting disgrace of this State." [5334]

Mr. Ranney, for the prosecution, concluded by arguing:

"Now, gentlemen, as meagre as this argument has been, and as much as I have boiled it down to a practical skeleton, please let me say this: First, that if Judge Thayer's mind was prejudiced at the trial, that must have shown itself in the record, and we urge that it does not; second, if Judge Thayer's mind was prejudiced after the trial and during the pendency of the motions for new trial, or during the history of the motions for new trial, then you will surely find something in the decisions or the [5346] results of his decisions, his findings, in other words, of those motions, and I want this Commission to study those motions, and if you can find that you agree with those decisions, then surely it negatives the prejudiced mind of this Judge; and, moreover, we go one step further, that even though you do not fully agree with the result of his finding, if you believe that was within reason, a reasonable decision, then there is no evidence of a prejudiced mind.

"Now, these are our theories, gentlemen. They may or may not be sound. We have stood a great deal in the last two years and a half; we have seen Court, District Attorney, his assistant, the deputy sheriff and all concerned with this case attacked, their reputations hurt, black things said about them, their reputations hurt forever by the wide publication of their attacks throughout the world, and the spreading of literature apparently by their clients' committees. Irreparable harm has been done in the defense of this case. How can Judge Thayer ever be the same man again? How can Katzmman or Williams be the same again after the things that have been said about them here, some of which have been published, though not those said in this room,—things that are said with the ease and con-

fidence of my brother, but things which are bitter, black statements, indicating not only prejudiced conduct but foul conduct?

"This Commission is in a very difficult situation, it seems to me. You must not say, gentlemen, that because the press of a large section of the country, and because many people have taken up the cause of these men, that there is a wide public following of them and that because of that it would be better as public policy to relieve them of the full penalty which has been given them, because, gentlemen, in doing that you destroy our courts, and I know you will not do that. I know that you will give to the Governor in reporting these facts only your findings, uninfluenced by public opinion, and if you gentlemen, with your wide experience in life and your technical training and your splendid position in this community, feel that a wrong was done, that there was fraud here, that these men did not get a fair trial, we shall be the first to congratulate you for your effort and stand back of your judgment. But if you cannot find the fraud or the wrong, I know that this Commission will report its facts without reference to public opinion, which we admit has grown very strong in some places.

"I am sorry if I have been hasty before you. I did not mean to be, and I simply want to say one personal word: It has been a very difficult piece of work, and I trust that you will not have to have any more hearings in this case in the hot summer weather. I can only thank you for your consideration, and I know, sirs, that you will give to this case the most perfect consideration, outside of public opinion." [5347]

Of the proceedings which during all this time had been going on before the Governor little can be said in the absence of any official record. The newspapers kept close track of all the Governor's movements and of all the people whom he saw. They also published accounts of the interviews which some of these persons gave. Counsel for the defendants sent to the Governor the reports made by the Pinkerton detectives on the Bridgewater hold-up. In a letter dated June 15th, 1927, analyzing these reports, counsel pointed out many instances of what they called the "forcing of evidence" to tie together the Bridgewater and Braintree crimes, by the artificially strained use of Boda and the Buick car as connecting links between the two. They said that a reward of \$1,000 had been paid by the White Company of Bridgewater and that some of it had gone to the police. Whether the Governor paid any attention to the Pinkerton reports does not appear. There can be little doubt that if they had been available to the defense at the trial in Plymouth the identification testimony against Vanzetti would have been discredited, so great are the discrepancies between the statements made to these detectives and the testimony given at that trial.¹

It was reported that Governor Fuller asked Miss Splaine to describe a man in an automobile and was so satisfied with the result of this test that he accepted her identification of Sacco as correct. Adherents of the defense maintained that the conditions of this test did not sufficiently correspond with those of April 15th, 1920, to give the results any value. Without more

¹ See pp. 184-187.

particulars than are available on this matter it is impossible for the reader to draw any conclusions.

Robert C. Benchley, one of the witnesses on the subject of Judge Thayer's prejudice, was interviewed by Governor Fuller and reported that he had been challenged by the Governor to show him a single place in the record which indicated that the trial had not been fair. John J. Richards, formerly United States Marshal in Providence, who, as such, had been active in the prosecution of the Morelli gang for stealing, is reported to have said, on leaving the Governor, that that official's attitude was one of suspicion and hostility.

Calvin H. Goddard, an expert in the examination of firearms, who claimed to have an infallible method of determining whether a particular bullet had been fired from a particular pistol, offered to make tests with the Sacco pistol and the mortal bullet. Such tests were made on June 3d, 1927, without the coöperation of counsel for the defendants, but in the presence of Professor Gill, who had made measurements for the defense the year before. Mr. Goddard expressed his conclusion that Sacco was guilty and wrote the Governor accordingly. Professor Gill was reported as having expressed doubt about the correctness of his earlier views after seeing Goddard make his test. Governor Fuller assured Mr. Thompson that he had paid no attention to this communication from Goddard. There was later newspaper controversy on this subject and there appeared in several periodicals articles which purported to show the unreliability of Goddard's methods. One of these articles, that in the *Nation*, brought about a libel suit which was later dropped.

The Governor spoke with both defendants in jail—with Sacco but briefly, as Sacco would not discuss the case; with Vanzetti, twice at length. On leaving him the second time, late on the night of July 26th, Governor Fuller shook hands with Vanzetti. And in a letter which the latter wrote immediately afterwards he interpreted this action of the Governor's as a favorable sign.

A few days before the Governor made his report he interviewed two members of the Defense Committee, Gardner Jackson and Aldino Felicani, and asked them for proof that Vanzetti, on the day before Christmas in 1919, had actually had for sale the eels on which he based his alibi in the Bridgewater case. Mr. Ehrmann succeeded in finding in the office of Corso and Gambino of 112 Atlantic Avenue, Boston, an old receipt book of the firm of Corso & Canizzo from 1919. It showed that on December 20th, 1919, this firm had shipped by American Express a forty-pound barrel to B. Vanzetti at Plymouth. The book was turned over to the Governor on August 2nd, 1927, the page in question having first been photographed.

Already, before the Governor received this last evidence, he was in possession of the report of his Advisory Committee. This was dated July 27th, just two days after the conclusion of the arguments before it, and six days after the last witness had testified.

Originally the execution had been set by Judge Thayer for July 10th. The evident impossibility of arriving at a decision before that time induced

Governor Fuller to postpone the execution for one month; but the postponement was not announced until the convicted men had been brought to the death cells in Charlestown Prison. The members of the Committee apparently did not wish to ask the Governor for a further respite. They therefore prepared their report almost immediately after the conclusion of the arguments before them.

It is to be regretted that a speedy decision should have appeared so desirable. A truly reflective judgment on issues as complicated as those presented in this case could hardly have been arrived at without the passage of time. That withdrawal from activity and lapse of time tend to throw the raw material of a problem into clear focus and proper perspective is a fact that throughout the ages has been recognized by priest and statesman. Under civilizations differing widely from each other retreats have been provided for those burdened with unusual cares and responsibilities, that they might find in seclusion and time the way to wise decisions.

In the present case neither Governor Fuller nor the members of his Advisory Committee seemed to feel the advisability of a withdrawal of this nature.

Their reports are given in full:

d. The Report of Governor Fuller

"BOSTON, MASSACHUSETTS, AUGUST 3, 1927.

"On April 15th, 1920, a paymaster and his guard were held up, robbed and brutally murdered at South Braintree, Massachusetts. On May 5th, 1920, Nicola Sacco and Bartolomeo Vanzetti were arrested; they were later tried and found guilty of the murder. The verdict was followed by seven motions for a new trial and two appeals to the Supreme Court for the Commonwealth, all of which were heard and later denied. Prior to the trial of the two men in this case, Vanzetti had been arrested, tried and convicted of an attempted holdup on December 24, 1919, at Bridgewater, Massachusetts, and sentenced to fifteen years imprisonment.

"The appeal to the Governor was presented by counsel for the accused on May 3rd of the present year. It was my first official connection with the case.

"This appeal, presented to me in accordance with the provision in the Constitution of our Commonwealth, has been considered without intent on my part to sustain the courts if I became convinced that an error had been committed or that the trial had been unfair to the accused.

"I realized at the outset that there were many sober-minded and conscientious men and women who were genuinely troubled about the guilt or innocence of the accused and the fairness of their trial. It seemed to me I ought to attempt to set the minds of such people at rest, if it could be done, but I realized that with all I could do personally to find out the truth, some people might well in the end doubt the correctness of any conclusion that I, or in fact any other one man, might reach. I believed that I could best reassure these honest doubters by having a committee conduct an investiga-

tion entirely independent of my own, their report to be made to me and to be of help in reaching correct conclusions. I felt that if after such a committee had conducted its investigation independently we were not in substantial agreement, then the course of Massachusetts justice did not flow in as clear a channel as I believed it should. The final decision and responsibility was, of course, mine. For this committee I desired men who were not only well and favorably known for their achieve[5378 c]ments in their own lines, but men whose reputations for intelligence, open-mindedness, intellectual honesty and good judgment were above reproach. I asked to serve on that committee President Abbott Lawrence Lowell of Harvard University, former Judge Robert Grant, and President Samuel W. Stratton of Massachusetts Institute of Technology. No one of them hesitated when asked to serve. They began work as soon as their other affairs could be arranged, labored continuously during much of June and through July, holding their sessions independently, and arrived unanimously at a conclusion which is wholly in accord with mine. The public owes these gentlemen its gratitude for their highminded, unselfish service on this disagreeable and extremely important problem.

"The court proceedings in this case may be divided into two parts: first, the trial before the jury with Judge Thayer presiding; second, the hearings on the succession of motions for a new trial which were addressed to the judge and passed upon by him. All those proceedings have been attacked by some of the friends of the accused men and their counsel.

"The attacks on the jury trial take two forms:—first, it is asserted that the men are innocent and that there was not sufficient evidence before the jury to justify a finding of guilty; second, it is asserted that the trial itself was unfair. The attacks on the proceedings and on the motions for a new trial are in substance that the judge was biased and unable to give the motions fair and impartial consideration.

"The inquiry that I have conducted has had to do with the following questions:—

"Was the jury trial fair?

"Were the accused entitled to a new trial?

"Are they guilty or not guilty?

"As to the first question, complaint has been made that the defendants were prosecuted and convicted because they were anarchists. As a matter of fact, the issue of anarchy was brought in by them as an explanation of their suspicious conduct. Their counsel, against the advice of Judge Thayer, decided to attribute their actions and conduct to the fact that they were anarchists, suggesting that they were armed to protect themselves, that they were about to start out, at ten o'clock at night, to collect radical [5378 d] literature, and that the reason they lied was to save their friends.

"I have consulted with every member of the jury now alive, eleven in number. They considered the judge fair; that he gave them no indication of his own opinion of the case. Affidavits have been presented claiming that the judge was prejudiced. I see no evidence of prejudice in his conduct of the trial. That he had an opinion as to the guilt or innocence of the accused after hearing the evidence is natural and inevitable.

"The allegation has been made that conditions in the court room were prejudicial to the accused. After careful inquiry of the jury and others, I

find no evidence to support this allegation. I find the jurors were thoroughly honest men and that they were reluctant to find these men guilty but were forced to do so by the evidence. I can see no warrant for the assertion that the jury trial was unfair.

"The charge of the judge was satisfactory to the counsel for the accused and no exceptions were taken to it. The Supreme Judicial Court for the Commonwealth has considered such of the more than 250 exceptions taken during the course of the trial as counsel for the accused chose to argue and over-ruled them all, thus establishing that the proceedings were without legal flaw.

"I have read the record and examined many witnesses and the jurymen to see from a layman's standpoint whether the trial was fairly conducted. I am convinced that it was.

"The next question is whether newly discovered evidence was of sufficient merit to warrant a new trial.

"After the verdict against these men, their counsel filed and argued before Judge Thayer seven distinct supplementary motions for a new trial six of them on the ground of newly discovered evidence, all of which were denied. I have examined all of these motions and read the affidavits in support of them to see whether they presented any valid reason for granting the accused men a new trial. I am convinced that they do not and I am further convinced that the presiding judge gave no evidence of bias in denying them all and refusing a new trial. The Supreme Judicial Court for the Commonwealth, which had before it appeals on four of the motions and had the opportunity to read the same affidavits which were submitted to Judge Thayer, declined to [5378e] sustain the contentions of counsel for the accused. In my own investigations on the question of guilt, I have given these motions and their supporting affidavits and the witnesses every consideration.

"I give no weight to the Madeiros confession. It is popularly supposed he confessed to committing this crime. In his testimony to me he could not recall the details or describe the neighborhood. He furthermore stated that the Government had doublecrossed him and he proposes to double-cross the Government. He feels that the District Attorney's office has treated him unfairly because his two confederates who were associated with him in the commission of the murder for which he was convicted were given life sentences, whereas he was sentenced to death. He confessed the crime for which he was convicted. I am not impressed with his knowledge of the South Braintree murders.

"It has been a difficult task to look back six years through other people's eyes. Many of the witnesses told me their story in a way I felt was more a matter of repetition than the product of their memory. Some witnesses replied that during the six years they had forgotten; they could not remember; that it was a disagreeable experience and they had tried to forget it. I could not hope to put myself in the position of a jurymen and have the advantage of seeing the witness on the stand and listening to the evidence and judging the spoken word. The motions for a new trial, however, were all made from affidavits and therefore they could be reviewed under the same circumstances as prevailed when the Judge heard them.

"The next question, and the most vital question of all, is that of the

should be subjected to questions by counsel,—certainly in the absence of specific evidence of misconduct. The Committee had thought that this principle should be applied also to Mr. Katzmman, the District Attorney who tried the case, but after he had talked with the Committee he consented to be questioned by Mr. Thompson. With these exceptions, and what came incidentally in an inspection of the scene of the murder, and a visit to Sacco, Vanzetti and Madeiros in prison, all testimony has been submitted to the [5378 i] Committee in the presence of both counsel; nor has any member of the Committee received evidence separately. Such a course has seemed to us desirable in order to give counsel an opportunity to meet and rebut any evidence presented to us. Moreover, the Committee have heard all evidence the counsel desired to present, and except as aforesaid has investigated in their presence any matters that seemed to bear on the questions before us.

“The inquiry that you have asked the Committee to undertake seems to consist of answering the three following questions:

(1) In their opinion, was the trial fairly conducted?

(2) Was the subsequently discovered evidence such that in their opinion a new trial ought to have been granted?

(3) Are they, or are they not, convinced beyond reasonable doubt that Sacco and Vanzetti were guilty of the murder?

“To us the reading of the stenographic report of the trial gives the impression that the Judge tried to be scrupulously fair.

“The cross-examination by Mr. Katzmman of the defendant Sacco on the subject of his political and social views seems at first unnecessarily harsh, and designed rather to prejudice the jury against him than for the legitimate purpose of testing the sincerity of his statements thereon; but it must be remembered that the position at that time was very different from what it is now. We have heard so much about the communistic or radical opinions of these two men that it is hard to put ourselves back into the position that they, and particularly Sacco, occupied at the time of the trial. There had been presented by the Government a certain amount of evidence of identification, and other circumstances tending to connect the prisoners with the murder, of such a character that—together with their being armed to the teeth and the falsehoods they stated when arrested—would in the case of New England Yankees, almost certainly have resulted in a verdict of murder in the first degree,—a result which the evidence for the alibis was not likely to overcome. Under these circumstances it seemed necessary to the defendants’ counsel to meet the inferences to be drawn from these falsehoods by attributing them to a cause other than consciousness of guilt of the South Braintree murder.

“From the statements before the Committee by the Judge and by one of the counsel for the defendants it appears that Judge Thayer suggested, out of the presence of the jury, that the counsel [5378 j] should think seriously before introducing evidence of radicalism which was liable to prejudice the jury; but at that stage of the case the counsel thought the danger of conviction so great that they put Sacco and Vanzetti on the stand to explain that their behavior at and after their arrest was due to fear for themselves or their friends of deportation or prosecution on account of their radical ideas, conduct and associations, and not to consciousness of guilt of

the murder at South Braintree. We have already remarked that at the present moment their views on these subjects are well known, but they were not so clear at the time. Save for his association with Vanzetti, and his own word on direct examination, there was, up to the time of his cross-examination, in the case of Sacco no certainty that he entertained any such sentiments. The United States authorities, who were hunting for Reds, had found nothing that would justify deportation or other proceedings against either of these men. Except the call for a meeting found in his pocket, there was no evidence that Sacco had taken a prominent part in public meetings, or belonged to any societies of that character; and although wholesale arrests of Reds—fortunately stopped by the decision of Judge Anderson of the United States Circuit Court—had recently been made in Southeastern Massachusetts, these men had not been among those arrested. At that time of abnormal fear and credulity on the subject little evidence was required to prove that anyone was a dangerous radical. Harmless professors and students in our colleges were accused of dangerous opinions, and it was almost inevitable that anyone who declared himself a radical, possessed of inflammatory literature, would be instantly believed. For these reasons Mr. Katzmman was justified in subjecting Mr. Sacco to a rigorous cross-examination to determine whether his profession that he and his friends were radicals liable to deportation was true, or was merely assumed for the purpose of the defense. The exceptions taken to his questions were not sustained by the Supreme Court.

"It has been said that while the acts and language of the Judge, as they appear in the stenographic report, seem to be correct, yet his attitude and emphasis conveyed a different impression. But the jury do not think so. They state that the Judge tried the case fairly; that they perceived no bias; and indeed some of them went so far as to say that they did not know when they [5378 k] entered the jury room to consider their verdict whether he thought the defendants innocent or guilty. It may be added that the Committee talked with the ten available members of the jury—one, the foreman, being dead, and another out of reach in Florida. To the Committee the jury seemed an unusually intelligent and independent body of men, and withal representative, seven of the twelve appearing to be wage-earners, one a farmer, two engaged in dealing in real estate, a grocer and a photographer. Each of them felt sure that the fact that the accused were foreigners and radicals had no effect upon his opinion, and that native Americans would have been equally certain to be convicted upon the same evidence.

"Affidavits were presented to the Committee and witnesses were heard to the effect that the Judge, during and after the trial, had expressed his opinion of guilt in vigorous terms. Prejudice means an opinion or sentiment before the trial. That a judge should form an opinion as the evidence comes in is inevitable, and not prejudicial if not in any way brought to the notice of the jury, as we are convinced was true in this case. Throughout this report the Committee have refrained from reviewing the evidence in detail and have stated only their conclusions with comments upon points that seemed of special significance. From all that has come to us we are forced to conclude that the Judge was indiscreet in conversation with outsiders during the trial. He ought not to have talked about the case off the bench,

and doing so was a grave breach of official decorum. But we do not believe that he used some of the expressions attributed to him, and we think that there is exaggeration in what the persons to whom he spoke remember. Furthermore, we believe that such indiscretions in conversation did not affect his conduct at the trial or the opinions of the jury, who, indeed, so stated to the Committee.

"In one of the motions for a new trial Mr. Thompson, now counsel for the defense, contended that between the District Attorney and officers of the United States Secret Service engaged in investigating radical movements there had been collusion for the purpose either of deporting these defendants as radicals or of convicting them of murder, and thus of getting them out of the way; that with this object Mr. Katzmänn agreed to cross-examine them on the subject of their opinions, and that the files of the Federal Department of Justice contain material tending to [53781] show the innocence of Sacco and Vanzetti. In support of these charges he filed affidavits by Ruzzamenti, Weyand, Letherman and Weiss which declared that the files of the Federal Department of Justice would show the correspondence that took place in the preparation of the case; but none of these affidavits states or implies that there is anything in those files which would help to show that the defendants are not guilty. For the Government to suppress evidence of innocence would be monstrous, and to make such a charge without evidence to support it is wrong. Mr. Katzmänn in answer to a question by Mr. Thompson stated to the Committee that the Federal Department had nothing to do with the preparation of the case, and there is no reason to suppose that the Federal agents knew the evidence he possessed. He stated also that he made no agreement with them about the cross-examination. A spy named Carbone was, indeed, placed in the cell next to that of Sacco, and it was stated in an agreement of subsequent counsel that this was to get from him information relating to the South Braintree murder; but Mr. Katzmänn, in answer to a question by Mr. Thompson, informs us that that is a mistake; that the Federal authorities wanted to put a man there with the hope of getting information about the explosion on Wall Street. To this he and the sheriff consented, but no information was in fact obtained.

"Before the Committee Mr. Thompson suggested that the fatal bullet shown at the trial as the one taken from Berardelli's body, and which caused his death, was not genuine; that the police had substituted it for another, in order by a false exhibit to convict these men; but in this case, again, he offered no credible evidence for the suspicion. Such an accusation, devoid of proof, may be dismissed without further comment, save that the case of the defendants must be rather desperate on its merits when counsel feel it necessary to resort to a charge of this kind.

"The claim that the District Attorney failed to summon witnesses favorable to the defendants, or to give the names to their counsel, will be discussed when treating of the motions for a new trial.

"Again it is alleged that the whole atmosphere of the court-room and its surroundings, with the armed police and evident precautions, were such as to prejudice the jury at the outset; while the remark of the Judge to the talesmen that they must do [5378 m] their duty as the soldier boys did in the war was of a nature to incline them against the prisoners. The jury do not seem to have been conscious of any such influence, or of the presence

of any unusual number of police. Nor do they appear to have entered upon the case with the slightest predisposition in favor of the prosecution, some of them at least very far from it. We do not think these allegations have a serious foundation.

"To summarize, therefore, what has been said: The Committee have seen no evidence sufficient to make them believe that the trial was unfair. On the contrary; they are of opinion that the Judge endeavored, and endeavored successfully, to secure for the defendants a fair trial; that the District Attorney was not in any way guilty of unprofessional behavior, that he conducted the prosecution vigorously but not improperly; and that the jury, a capable, impartial and unprejudiced body, did, as they were instructed, 'well and truly try and true deliverance make.'

"If the trial was fairly conducted, we are brought to the second point,—whether, on account of newly discovered evidence, any of the motions for a new trial should have been granted. So far as exceptions to the denial by the Judge of these motions have been taken to the Supreme Judicial Court of the Commonwealth, they have not been sustained there; but the counsel for the defendants contend that the Supreme Court decided only that these matters were properly within the discretion of the Judge, and that his discretion had not been abused. They urge, therefore, that while the Judge's discretion was not illegally, it was in fact wrongly, exercised, because he was too prejudiced to be impartial; and that a wholly impartial exercise of discretion would have brought an order for a new trial.

"There can be no doubt that the Judge has been subjected to a very severe strain. Apart from the responsibility that he has borne, the nature of the criticisms made upon him has had its effect; and the Committee are of opinion that while there is no sufficient evidence that his capacity to decide rightly the questions before him in this case has been impaired, nevertheless he has been in a distinctly nervous condition. The Committee have felt constrained, therefore, to examine the motions for a new trial and the evidence on which they are based, with a view of determining whether in their opinion the discretion of the Judge on each motion was in fact rightly exercised. We cannot put ourselves in the [5378 n] position of the jury at the trial, because we cannot see the witnesses upon the stand, and therefore have not the opportunities they possessed of judging the weight to be given to the testimony of each witness. Even if we were to see them all now, their appearance may be very different from what it was under cross-examination. But the motions for a new trial were all heard on affidavits or depositions, without oral evidence, and therefore the Committee are in the same position with regard to their credibility and weight as was the Judge when he heard them.

"The first of these motions for a new trial is that known by the name of Gould. He was a by-stander through the lapel of whose coat a bullet was fired by the bandits, and who was questioned by the police. He was not called as a witness by the prosecution, but he was certainly close to the car, and has since made an affidavit to the effect that the men he saw were not the defendants. Two questions arise in his case; first whether his evidence, discovered by the defendants since the trial, is sufficient to demand a new trial; and second whether it shows a suppression of evidence by the Commonwealth. In regard to the first, he certainly had an unusually

good position to observe the men in the car; but on the other hand his evidence is merely cumulative, the defendants having produced a large number of witnesses to swear to the same thing, and it is balanced by two other new witnesses on the other side. One is Mrs. Hewins, who stated to Mr. Thompson, as appears in one of his affidavits, that the bandit car stopped to ask the way at her house and that Sacco was driving it. Sacco, if guilty, may have been doing so at that moment, or she may have mistaken whether he was behind the wheel or in the other place on the front seat. The other witness is Mrs. Tattoni,¹ formerly Lottie Packard, who claims to have known Sacco when he was working in the factory of Rice & Hutchins where she also worked, and to have seen him at South Braintree on the morning of April 15th on Pearl Street. The woman is eccentric, not unimpeachable in conduct; but the Committee believe that in this case her testimony is well worth consideration. There seems to be no reason to think that the statement of Gould would have any effect in changing the mind of the jury. The second question is whether the failure either to put Gould upon the stand or to give his name to the defendants amounts to a suppression of evidence. Gould was questioned within a few days of the murder, before the present [5378 o] defendants were thought of in connection with the crime, and apparently was not followed up because it was not thought he could give valuable testimony whoever the criminals might turn out to be. By occupation he was itinerant, and there is no evidence that he had an opportunity to see Sacco and Vanzetti after they were captured, and hence to say whether they were or were not the men he had seen at South Braintree. There seems to the Committee to be nothing in the nature of a concealment by the prosecution of evidence that it believed valuable for the defense.

"Another motion for a new trial is based upon the fact that Walter Ripley, the foreman of the jury, happened to have in his pocket throughout the trial three 38-caliber revolver cartridges of the same kind as those found in the revolver of Vanzetti when arrested. The Supreme Court in the case of that motion, as of others, held that the refusal of a new trial was within the discretion of the Judge; but, as we have observed, this does not decide that his discretion was rightly exercised. There is no evidence that the presence of these cartridges did influence the opinion of the jury; but the question for us is whether it may reasonably have done so, and we do not see how it could have had any such effect. It was suggested by Albert H. Hamilton, who made an affidavit as an expert, that the jury might have derived from these cartridges an erroneous opinion as to the age of those found in Vanzetti's revolver. It is not easy to see how they could have formed any such opinion, or what material significance there was in the age of the Vanzetti cartridges. The presence of these objects in the jury room may have been irregular, but we do not see how it could have changed the result of the trial, and if so, the Judge ought not in justice to have ordered a new trial on that ground.

"Under the same motion was introduced an affidavit by William H. Daly, wherein he says that Ripley, when summoned as a talesman, in answer to the question by him whether he was to be a juror in this case replied 'Damn them, they ought to hang them anyway.' Now it is extremely improbable

¹ Mrs. Tattillo.

that Ripley was so different from other men that he desired the disagreeable task of serving on this jury, and he had only to reveal what he had said to be excused. Yet in spite of a selective process in making up the jury, so rigorous that out of the first five hundred talesmen only seven were taken, he was one of these. He did [5378 p] not live to contradict the statement, and we believe that Daly must have misunderstood him, or that his recollection is at fault.

"The fifth supplementary motion for a new trial is known by the name of Captain Proctor, the police officer who testified as an expert on the question whether the fatal bullet found in Berardelli's body had been fired through Sacco's pistol. At the trial he was asked in regard to this matter as follows:

'Q. Have you an opinion as to whether bullet no. 3 was fired from the Colt automatic which is in evidence? A. I have.

Q. What is your opinion? A. My opinion is that it is consistent with being fired by that pistol.'

In his affidavit of October 20, 1923, he says that while he was examining the bullet in preparation for the trial his attention was repeatedly called by the prosecuting attorneys to the question whether he could find any evidence that would justify the opinion that the bullet taken from the body of Berardelli—which came from a Colt automatic pistol—came from the particular pistol taken from Sacco, but at no time was able to find any evidence to convince him that it came from that pistol; that the District Attorney desired to ask him that question directly, but he repeatedly replied that if so, he would be obliged to answer in the negative. The two prosecuting attorneys in their affidavits denied that they had repeatedly asked him whether he had found evidence that the bullet was fired by Sacco's pistol; and Mr. Williams, who interrogated him, added that the form of the question was suggested by Proctor himself. It may be noted that Mr. Katzmänn stated to the Committee, in answer to a question by counsel for the Commonwealth, that before Proctor made his affidavit he—Mr. Katzmänn—had refused to approve Proctor's bill of \$500 for expert testimony. Counsel for the defendants claim that the form of the question and answer was devised to mislead the jury; but it must be assumed that the jury understood the meaning of plain English words, that if Captain Proctor was of opinion that the bullet had been fired through Sacco's pistol he would have said so, instead of using language which meant that it might have been fired through that pistol. In his charge the Judge referred to the expert evidence on the question whether the bullet had been fired from Sacco's [5378 q] pistol, saying 'To this effect the Commonwealth introduced the testimony of two experts, Messrs. Proctor and Van Amburgh.' These two men did testify on the subject, the first saying that it might have gone through Sacco's pistol, the second that it did so; the experts for the defendants giving their opinion that it could not have gone through Sacco's pistol. It may be observed that the prosecuting attorney did not put the words into Captain Proctor's mouth, but asked him simply what his opinion was, and that Captain Proctor in answer used words that seem not unadapted to express his meaning. It does not seem to us that there is good ground to suppose that his answer was designed to mislead the jury. We shall return

to this subject in connection with new evidence brought to the Committee.

"In connection with this motion, affidavits by the experts, Albert H. Hamilton and Augustus H. Gill, supported by enlarged photographs, were submitted to prove that the bullet could not have been fired through Sacco's pistol; while other experts, Charles Van Amburgh and Merton A. Robinson, using the same photographs, stated their opinion that the marks appearing thereon show that the bullet was fired through that pistol. An inspection of the photographs, following the reading of these affidavits for the defendants and for the Government, leads us to the conclusion that the latter presented the more convincing evidence. We are of opinion, therefore, that the Judge could not properly have ordered a new trial on the Proctor motion.

"Another motion for a new trial, denied by the Judge, was never brought by exceptions before the Supreme Judicial Court. It was based upon an affidavit by Lola M. Andrews, stating that her evidence of identification at the trial was false. This is the witness who on cross-examination at the trial testified that Mr. Moore, then counsel for Sacco, at an interview with her suggested that she should take a vacation in Maine, and that if she lost her job in consequence he would find her as good or a better one; and who, after that interview, and after her identification of Sacco at the Dedham jail, was assaulted by a stranger at her home. Subsequent to the affidavit on which the motion was made, she swore to another in which she said that the former had been obtained by a threat of using discreditable events in her past life to the injury of her son; and the statements of Moore and another man employed by him show that they had [5378 r] hunted up, and told her they possessed, the information she claims they used. The Judge very properly refused to grant a new trial upon an affidavit procured in this way, and Mr. Moore let the matter drop.

"We now come to the motion for a new trial, based upon the confession of Madeiros, and the affidavits that accompany it. The exceptions to the denial of this motion by Judge Thayer are those which in its recent decision the Supreme Judicial Court has not sustained. The question whether a new trial ought to have been granted in consequence of the confession of Madeiros depends upon the weight which can be attributed to it, and the importance of the evidence offered in corroboration. The impression has gone abroad that Madeiros confessed committing the murder at South Braintree. Strangely enough, this is not really the case. He confesses to being present, but not to being guilty of the murder. That is, he says that he, as a youth of eighteen, was induced to go with the others without knowing where he was going, or what was to be done, save that there was to be a hold-up which would not involve killing; and that he took no part in what was done. In short, if he were tried, his own confession, if wholly believed, would not be sufficient for a verdict of murder in the first degree. His ignorance of what happened is extraordinary, and much of it cannot be attributed to a desire to shield his associates, for it had no connection therewith. This is true of his inability to recollect the position of the buildings, and whether one or more men were killed. In his deposition he says that he was so scared that he could remember nothing immediately after the shooting. To the Committee he said that the shooting brought on an epileptic fit which showed itself by a failure of memory; but that hardly explains the

fact that he could not tell the Committee whether before the shooting the car reached its position in front of the Slater & Morrill factory by going down Pearl Street or by a circuit through a roundabout road. Indeed, in his whole testimony there is only one fact that can be checked up as showing a personal knowledge of what really happened, and that was his statement that after the murder car stopped to ask the way at the house of Mrs. Hewins at the corner of Oak and Orchard Streets in Randolph. As this house was not far from the place on a nearby road where Medeiros subsequently lived, he might very well have heard the fact mentioned. In short, [5378 s] if the Government were to try to convict him of this offense, and he were to say that the whole thing was a fabrication to help Sacco and Vanzetti, he certainly could not be convicted on his own confession, and probably not even indicted.

"How far do the other affidavits corroborate his statement? They state that Madeiros—who seems to have been rather prone to boast of his feats—had previously told Weeks that he had taken part with the Morelli gang in the South Braintree crime, and had talked with the Monterios also about it. The affidavits further state that he was acquainted with this gang, which consisted of a hardened set of criminals who had stolen shoes shipped from the Slater & Morrill and Rice & Hutchins factories, and were accustomed to spot the shipments when made at such factories; that on April 15th, 1920, a number of that gang were out on bail for a different offense for which they were afterwards sentenced, and consequently could physically have been at South Braintree; that the photographs of Joe Morelli showed a distinct resemblance to Sacco and to whoever shot Berardelli, and that of Benkoski to the driver of the car—but identification by photograph is very uncertain; that Joe Morelli possessed a Colt automatic 32-caliber pistol. They state that one of the gang was seen in Providence late on the afternoon of April 15th in a Buick car which, by the officer who so reported, was seen no more. In regard to the last item, the great improbability may be noted that bandits who intended to hide the car in which they made their escape should have first shown it in the streets of Providence after all but one of the members of the gang had already returned in another car. Even without considering the contradictory evidence it does not seem to the Committee that these affidavits to corroborate a worthless confession are of such weight as to deserve serious attention.

"The motion for a new trial based upon the confession of Madeiros includes the affidavits offered to show a combination between the District Attorney and the secret service officers of the Federal Government to convict these men of murder in order to get rid of them. These affidavits we have already discussed, and we agree wholly with the remark of Mr. Justice Wait in the opinion of the Supreme Judicial Court that 'An impartial, intelligent and honest judge . . . would be compelled to find that no substantial evidence appeared that the department of justice of the [5378 t] United States had in its control any proof of the innocence of these defendants, or had conspired to secure their conviction by wrongful means.'

"After considering all the evidence given in support of the various motions for a new trial, we are of opinion that it is not 'so grave, material and relevant as to afford a probability that it would be a real factor with the jury in reaching a decision.'

"There remains a reference to new evidence brought before the Committee, and not hereinbefore considered. The only two matters that seem to us significant are as follows: The counsel for the defendants produced Albert H. Hamilton and Elias Field, who informed the Committee that in an automobile ride Captain Proctor had told Hamilton that in his real opinion the fatal bullet had not been fired through Sacco's pistol. After the time of this conversation Captain Proctor made the affidavit already referred to, and in that, after quoting his testimony at the trial—

'Q. What is your opinion? A. My opinion is that it is consistent with being fired by that pistol.'

he says 'That is still my opinion.' It seems to us improbable that Captain Proctor, who has since died, should have stated both at the trial and in his affidavit that his opinion was consistent with the firing of the bullet from Sacco's pistol, and in the meanwhile should have said in conversation that his opinion was exactly the opposite. One of the witnesses, Field, merely overheard Proctor's conversation with Hamilton about a subject with which he was not familiar; and the latter stated also to the Committee that Proctor told him that he believed before the trial the bullet was not fired through the Sacco pistol, which would be an admission not of a misleading statement but of deliberate perjury. This charge is inconsistent with Proctor's later affidavit, and we do not believe Hamilton's testimony on this point.

"The other significant new matter brought to the attention of the Committee by the counsel for the defense is the statement of Jeremiah F. Gullivan, former Chief of Police of Braintree, who said that in the cap found near the body of Berardelli, and claimed by the prosecuting counsel to be that of Sacco, the rent attributed by them to its hanging upon a nail in the factory, was in fact made by him in attempting to find a name under the lining before he [5378 u] delivered the cap to the officers investigating the case. This statement we believe to be true; but the rent in the lining of the cap is so trifling a matter in the evidence in the case that it seems to the Committee by no means a ground for a new trial.

"Mr. James E. King brought to the attention of the Committee some calculations he has been making about the position at various times of the escaping bandit car, to the effect that if it travelled at the rate of speed the witnesses testified it would have taken much more time than elapsed between the moment of the murder and the arrival at the Matfield crossing. He suggested that the delay could be accounted for on the theory that the Morelli gang had committed the murder and spent some time in the Randolph woods three and a half miles from South Braintree while changing from a Buick to a Hudson, as described by Madeiros. To the Committee it seems that the calculations are based upon somewhat uncertain data, and that the delay is apparently accounted for by the undisputed fact that the bandits turned by mistake into Orchard Street, which leads into a much-travelled highway and to the town of Randolph; that, discovering their mistake, they retraced their steps and inquired at the Hewins house the way to the old turnpike. It seems incredible that the bandits, as Mr. King supposes, should have spent something like twenty minutes in woods not far from the road and so short a distance from the scene of the murder.

"Finally, there is the question whether in our opinion Sacco and Van-

zetti are or are not guilty beyond reasonable doubt of the crime of which they have been convicted. Of the nature of the crime itself there is no question. Whoever committed it would be sentenced rightly for murder in first degree.

"In the discussion of what should be done about Sacco and Vanzetti, popular attention has been largely diverted by the belief that they hold unpopular views on political and social questions. Your Committee assume that this has nothing whatever to do with the question except so far as it may account for conduct that would otherwise be taken as evidence of consciousness of guilt. The fact that persons accused are or are not socialists or radicals of any type neither increases nor lessens the probability of their having committed the crime, and should be left wholly out of account except so far as in this instance it may explain their conduct at and shortly after their arrest. [5378 v]

"The case has been popularly discussed as if it were one turning mainly upon identification by eye witnesses. That, of course, is a part, but only a part, of the evidence. As with the Bertillon measurements or with finger prints, no one measure or line has by itself much significance, yet together they may produce a perfect identification; so a number of circumstances—no one of them conclusive—may together make a proof clear beyond reasonable doubt. In the case of Sacco the chief circumstances are as follows: He looks so much like one of the gang who committed the murder that a number of witnesses are sure that he is the man. Others disagree; but at least his general appearance is admitted even by many of those who deny the identity to resemble one of the men who took part in the affair. Then a cap is found on the ground near the body of the man he is accused of killing, which bears a resemblance in color and general appearance to those he was in the habit of wearing; and when tried on in court it fitted,—that is, his head was the size of one of the men who did the shooting. Then there is the fact that a pistol that Berardelli had been in the habit of carrying, and which there is no sufficient reason to suppose was not in his possession at the time of the murder, disappeared and a pistol of the same kind was found in the possession of Vanzetti when he and Sacco were arrested together, and of which no satisfactory explanation is given. It is difficult to suppose that Berardelli was not carrying his pistol at the time he was guarding the paymaster with the pay-roll, and no pistol was found upon his person after his death. It is natural also, if the bandits saw his pistol they should carry it off for fear of someone shooting at them as they escaped. Moreover, when Sacco was arrested he had a pistol which is admitted to be of the kind from which the fatal bullet was fired. In the controversy between the experts, one side striving to show that the bullet must have been, and the other that it could not have been, fired through that pistol, we are inclined from an inspection of the photographs to believe that the former are right; if they are, there could be little or no doubt—even if there were no other evidence—that the owner of the pistol fired the shot. But even if we assume that all expert evidence on such subjects is more or less unreliable, we can be sure that the shot was fired by the kind of pistol in the possession of Sacco. Then again, the fatal bullet found in Berardelli's body was of a type no longer manufactured and so obsolete that the [5378 w] defendants' expert witness, Burns, testified that, with the help of two as-

sistants, he was unable to find such bullets for purposes of experiment; yet the same obsolete type of cartridges was found in Sacco's pockets on his arrest. It is true that the expert Hamilton deposed that in these cartridges the knurls were true with the axis of the bullet, while in the fatal bullet they were at an angle of three degrees, which led him to believe that they must have been manufactured at different times. But the expert Robinson—himself ballistic engineer in the Winchester factory where these bullets were made—wholly refuted this statement by showing that the fatal bullet was so deformed that it was impossible to determine its original axis within three degrees, and that the Winchester Company had never manufactured bullets with knurls not parallel to their axes. Such a coincidence of the fatal bullet and those found on Sacco would, if accidental, certainly be extraordinary.

"Furthermore, there is the fact that when examined after their arrest they told what they afterwards admitted on the stand to be a series of lies. This they attempted to explain by saying that they were afraid of deportation or other punishment for themselves or their friends, because they were conscious of having dodged the draft, of possessing socialistic literature, and in general of being of the type that the Federal Government was then persecuting. The difficulty with this excuse is that it by no means explains all their falsehoods, some of which had no connection whatever with their being Reds, but did have a very close connection with the crime at South Braintree. Such, for example, was Sacco's statement that he worked at the factory all day on the 15th. If he were innocent of the crime, and had been in Boston that day to get a passport, why should he not have said so when first questioned?

"Finally there is the fact that both of them were armed for quick action when arrested. Sacco had a fully loaded automatic pistol under the front of the belt of his trousers and twenty-two spare cartridges in his pocket. Vanzetti had a fully loaded 38-caliber revolver. It is claimed that Italians, particularly those who get into criminal difficulties, commonly carry weapons; but carrying fully loaded firearms, where they can be most quickly drawn, can hardly be common among people whose views are pacifist and opposed to all violence. Such a condition cannot be [5378 x] explained by the fear of being arrested as Reds, nor did the defendants attempt to set up such an excuse. Indeed they could hardly have alleged that they went fully armed in order to be prepared to shoot officers who attempted to arrest them for that reason. Vanzetti declared that he carried a pistol because there were so many robberies and other crimes; Sacco that he put his pistol in the belt of his trousers to fire away the cartridges in the woods the day he was arrested, but that in conversation he was detained from doing so, had forgotten about his pistol, and was quite unconscious that he had it in the belt of his trousers. That statement seems incredible.

"On these grounds the Committee are of opinion that Sacco was guilty beyond reasonable doubt of the murder at South Braintree. In reaching this conclusion they are aware that it involves a disbelief in the evidence of his alibi at Boston, but in view of all the evidence they do not believe he was there that day.

"The evidence against Vanzetti is somewhat different. His association

with Sacco tends to show that he belonged to the same group. His having a pistol resembling the one formerly possessed by Berardelli has some importance, and the fact that no cartridges for it were found in his possession, except those in it, is significant. So also is his having cartridges loaded with buck-shot, of which his account sounds improbable, and which might well have been used in the gun some witnesses saw sticking out of the back of the car. His falsehoods and his armed condition have a weight similar to that in the case of Sacco. In one way they are a little stronger because he virtually confirms the statement of officer Connolly that he tried to draw his pistol when arrested, for he testified that the officer pointed a revolver at him and said 'You don't move, you dirty thing,'—an admission that the officer thought he was making a movement towards his pistol. On the other hand, all these actions may be accounted for by consciousness of guilt of the attempted robbery and murder at Bridgewater, of which he has been convicted.

"The alibi of Vanzetti is decidedly weak. One of the witnesses, Rosen, seems to the Committee to have been shown by the cross-examination to be lying at the trial; another, Mrs. Brini, had sworn to an alibi for him in the Bridgewater case, and two more of the witnesses did not seem certain of the date until they had talked it over. Under these circumstances, if he was with Sacco, [5378 y] or in the bandits' car, or indeed in South Braintree at all that day, he was undoubtedly guilty; for there is no reason why, if he were there for an innocent purpose, he should have sworn that he was in Plymouth all day. Now there are four persons who testified that they had seen him,—Dolbeare, who says he saw him in the morning in a car on the main street of South Braintree; Levangie, who said he saw him—erroneously at the wheel—as the car crossed the tracks after the shooting; and Austin T. Reed, who says that Vanzetti swore at him from the car at the Matfield railroad crossing. The fourth man was Faulkner, who testified that he was asked a question by Vanzetti in a smoking car on the way from Plymouth to South Braintree on the forenoon of the day of the murder, and that he saw him alight at that station. Faulkner's testimony is impeached on two grounds: First, that he said the car was a combination smoker and baggage car, and that there was no such car on that train, but his description of the interior is exactly that of a full smoking car; and, second, that no ticket that could be so used was sold that morning at any of the stations in or near Plymouth, and that no such cash fare was paid or mileage book punched, but that does not exhaust the possibilities. Otherwise no one claims to have seen him, or any man resembling him who was not Vanzetti. But it must be remembered that his face is much more unusual, and more easily remembered, than that of Sacco. He was evidently not in the foreground. On the whole, we are of opinion that Vanzetti also was guilty beyond reasonable doubt.

"It has been urged that a crime of this kind must have been committed by professionals, and it is for well-known criminal gangs that one must look; but to the Committee both this crime and the one at Bridgewater do not seem to bear the marks of professionals, but of men inexpert in such crimes." [5378 z]

f. Last Legal Steps

Even before the publication of the Lowell report further legal steps on behalf of the condemned men were attempted. Mr. Thompson retired as their attorney, believing he had done all that was possible and that his continuation might only embarrass the few remaining moves. Mr. Arthur D. Hill, on August 6th, 1927, made a motion for revocation of sentence and for a new trial on the ground of Judge Thayer's prejudice. The petition alleged that the trial had not been conducted in accordance with the requirements of the due process clauses of the State Constitution and the Constitution of the United States. Thus was a basis laid for an appeal to the Federal courts. On the same day Mr. Hill applied to Chief Judge Hall for a speedy hearing of the motion. After the Chief Judge directed that it be heard before Judge Thayer on Monday, August 8th, Mr. Hill requested that another judge be assigned to hear the motion because it was not proper that Judge Thayer sit to pass on his own prejudice. The request was denied by Chief Judge Hall, on the ground that it was in accordance with established practice that a motion for a new trial be heard before the judge who had presided at the original trial.

When this motion came on before Judge Thayer, Mr. Hill asked him to decline to hear the motion. Judge Thayer refused to withdraw and asked counsel to confine their argument to his jurisdiction to entertain the motion. This subject of jurisdiction constituted a serious question since the statute provided that no new trial could be ordered in a capital case after sentence had been pronounced, the practice being to take all possible legal steps before the imposition of sentence. It was for this reason that the motion asked also for the revocation of the sentence. For the Commonwealth argument was made in opposition to the motion by the Attorney General of the State, Mr. Arthur K. Reading. Judge Thayer immediately denied the motion for a new trial on the ground that he had no jurisdiction; the motion for revocation of sentence was denied the next day.

In the meantime, and also on August 6th, Mr. Hill filed with the Supreme Judicial Court a petition for a writ of error, which according to law might be granted by a single justice of that court. This petition also was based on Judge Thayer's prejudice. Argument on the application was heard before Mr. Justice Sanderson on August 8th. Mr. Thompson testified to his own observation of Judge Thayer at the trial. After argument the Judge said: "After giving careful consideration to the matter I consider it my duty to deny the application for the writ."

From both these decisions appeal was at once taken to the full bench of the Supreme Judicial Court, but as the execution was set for a date earlier than any possible hearing, earnest efforts were made to obtain a stay from the Governor and also to obtain writs of habeas corpus from Federal judges.

Mr. Justice Oliver Wendell Holmes, the oldest and perhaps the most generally beloved and respected member of the United States Supreme

Court, himself a former judge of the Massachusetts Supreme Judicial Court, was at his summer home in Beverly Farms, Mass. A petition for a writ of habeas corpus alleging that the constitutional rights of the defendants had been infringed because they had had no fair trial was presented to him. On August 10th he denied it in the following memorandum:

"This petition was presented to me this tenth day of August, 1927, and was argued by counsel for the petitioners. I am unable to find in the petition or affidavits as I understand them any facts that would warrant my issuing the writ. I have no authority to issue it unless it appears that the Court had not jurisdiction of the case in a real sense so that no more than the form of a court was there. But I cannot think that prejudice on the part of the presiding judge however strong would deprive the Court of jurisdiction, that is of legal power to decide the case, and in my opinion nothing short of a want of legal power to decide the case authorizes me to interfere in this summary way with the proceedings of the State Court." [5532]

Later on the same day the same petition was presented to Judge Anderson of the United States Circuit Court. He also denied the application in a brief memorandum:

"This petition was this tenth day of August, 1927 presented to Mr. Justice Holmes and denied by him in a memorandum a copy of which is hereto attached. I assume that, strange as it may seem, a circuit judge might take a different view and issue the writ. But I am unable to take a different view. *Moore v Dempsey* 261 U. S. 86, relied upon by petitioners I think conclusive against them when read with the petition and its supporting affidavits. I have on this record no right to interfere with the legal processes of the Courts of Massachusetts." [5533]

A few minutes before the time set for the execution, the Governor announced a reprieve until August 22nd to enable the Supreme Judicial Court to pass on the pending motions. Argument was had before the Supreme Judicial Court on the 16th. In the brief for the Commonwealth it was contended that the function of a writ of error was only to review the record and not to raise questions such as that of prejudice, which were outside the record of conviction, and that it was discretionary with the judge before whom the application was made whether or not such writ of error should be granted. This position was sustained by the Court. The judges sitting were Braley, Pierce, Carroll, and Wait. Justice Braley wrote the opinion. (reported in 261 Mass. 12). It was decided also that Judge Thayer had no jurisdiction to revoke sentence or grant a new trial and therefore that the question of his prejudice did not come up for decision. So ended all hope of relief in the courts of the State.

When this result became known, on August 19th, efforts were at once made to file with the Supreme Court of the United States petitions for writs of certiorari which would permit the review by that Court of the entire record in the State courts. To do this it was necessary to file with the clerk of the Court in Washington a copy of the state record, and, since that

Court would not be in session until October, to get from one of the Justices a stay of the execution. While this was being prepared a third attempt was made to obtain a writ of habeas corpus, but Judge James M. Morton, of the United States District Court in Boston, on the 19th, denied the application, saying:

"This petition was presented to me on the nineteenth day of August 1927 and was argued by counsel for the petitioners.

"I understand from counsel that, except for the recital of such facts in the case as have occurred since August tenth last, the present petition is in substance the same as that which was on that day presented to and denied by Mr. Justice Holmes and Circuit Judge Anderson. It is not contended that the new facts change the case, as to the alleged federal question, from that passed upon by Mr. Justice Holmes and Judge Anderson except that all remedies in the State courts have now been exhausted; and it is clear that they do not. The principles of law involved are clearly stated in Mr. Justice Holmes's memorandum. While it is true that the denial of the other petition does not constitute an adjudication binding upon the petitioners, these concurring decisions on the same case are entitled to great weight. Plainly I ought not to disregard them unless convinced that they are wrong.

"I am by no means so convinced. I concur in the statement of the law by Mr. Justice Holmes in his memorandum, and with the conclusion of Judge Anderson that, 'I have on this record no right to interfere with the legal processes of the courts of Massachusetts.' The better practice would have been to present this final petition to one of the judges who had already dealt with the case.

"The federal questions involved are not in my opinion of sufficient substance or doubt to justify me in making certificate of probable cause for an appeal under the Act of February 13, 1925." [5534]

Mr. M. A. Musmanno, associated with the defense, went to Washington on Saturday, the twentieth, to file the petitions for certiorari. On the same day Mr. Hill made an application to Mr. Justice Holmes for a stay of the execution. This was denied, the judge giving his reasons why there was no basis for interference by the United States Courts:

"This is a case of a crime charged under state laws and tried by a State Court. I have absolutely no authority as a Judge of the United States to meddle with it. If the proceedings were void in a legal sense, as when the forms of a trial are gone through in a Court surrounded and invaded by an infuriated mob ready to lynch prisoner, counsel and jury if there is not a prompt conviction, in such a case no doubt I might issue a habeas corpus—not because I was a Judge of the United States, but simply as anyone having authority to issue the writ might do so, on the ground that a void proceeding was no warrant for the detention of the accused. No one who knows anything of the law would hold that the trial of Sacco and Vanzetti was a void proceeding. They might argue that it was voidable and ought to be set aside by those having power to do it, but until set aside, the proceeding must stand. That is the difference between void and voidable—and I have no power to set the proceeding aside—that, subject to the exception

that I shall mention, rests wholly with the State. I have received many letters from people who seem to suppose that I have a general discretion to see that justice is done. They are written with the confidence that sometimes goes with ignorance of the law. Of course, as I have said, I have no such power. The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and can not be disposed of by a summary statement that justice requires me to cut red tape and to intervene. Far stronger cases than this have arisen with regard to the blacks when the Supreme Court has denied its power.

"A State decision may be set aside by the Supreme Court of the United States—not by a single Justice of that Court—if the record of the case shows that the Constitution has been infringed in specific ways. An application for a writ of certiorari has been filed on the ground that the record shows such an infringement; and the writ of habeas corpus having been denied, I am asked to grant a stay of execution until that application can be considered by the full Court. I assume that under the Statute my power extends to this case although I am not free from doubt. But it is a power rarely exercised and I should not be doing my duty if I exercised it unless I thought that there was a reasonable chance that the Court would entertain the application and ultimately reverse the judgment. This I can not bring myself to believe. The essential fact of record that is relied upon is that the question of Judge Thayer's prejudice, raised and it is said discovered only after the trial and verdict, was left to Judge Thayer and not to another Judge. But as I put it to counsel if the Constitution of Massachusetts had provided that a trial before a single Judge should be final, without appeal, it would have been consistent with the Constitution of the United States. In such a case there would be no [5516] remedy for prejudice on the part of the Judge except Executive Clemency. Massachusetts has done more than that. I see nothing in the Constitution warranting a complaint that it has not done more still.

"It is asked how it would be if the Judge were subsequently shown to have been corruptly interested or insane. I will not attempt to decide at what point a judgment might be held to be absolutely void on these grounds. It is perfectly plain that although strong language is used in the present application the judgment was not void even if I interpret the affidavits as proving all that the petitioners think they prove—which is somewhat more than I have drawn from them. I do not consider that I am at liberty to deal with this case differently from the way in which I should treat one that excited no public interest and that was less powerfully presented. I cannot say that I have a doubt and therefore I must deny the stay. But although I must act on my convictions I do so without prejudice to an application to another of the Justices which I should be very glad to see made, as I am far from saying that I think counsel was not warranted in presenting the question raised in the application by this and the previous writ." [5517]

Two other justices of the United States Supreme Court were at the time summering in New England. Mr. Justice Brandeis on the 21st refused to take any action in connection with the case, because, as he said, "of personal relations with some of the people interested"; both his wife and daughter

had shown interest in the case. Mr. Justice Stone was on an island off the coast of Maine. Mr. Hill went there to see him and on the very last day, the 22nd, reported failure. Justice Stone wrote a brief memorandum:

"Application considered and denied without prejudice to application to any other justice. I concur in the view expressed by Justice Holmes as to the merits of the application and action of counsel in presenting it." [5517]

A telegram had also been sent to Chief Justice Taft who was in Canada, asking him to cross the border to consider an application, but he refused to do so on the ground that there were three other justices available. Applications made on the very eve of the execution to Judge Sisk of the State Court and to Judge Lowell of the Federal Court were both denied for lack of jurisdiction. Legal help was not to be obtained.

Efforts were made to get another respite from the Governor and also to have the Department of Justice open its files. The head of the department, Attorney General Sargent, was in Ludlow, Vermont, and referred inquiries to the acting head, Mr. Farnum. He was interviewed by Messrs. Frank P. Walsh, Francis Fisher Kane and Arthur Garfield Hays, after they had seen Mr. Sargent, and he finally stated that if the Governor or the Lowell Committee asked for the files they would be turned over to them. Mr. Farnum stated also that a recent thorough examination of the files had disclosed nothing bearing on the guilt or innocence of Sacco or Vanzetti, nor anything showing collusion between Federal and State authorities. The Governor, on the 22nd, announced he would not take advantage of that offer and the files were never turned over.¹

In October the case was stricken from the docket of the United States Supreme Court, and so, legally, came to an end.

¹ An unofficial summary of the files was published in the press. See page 20.

APPENDIX

THE BRIDGEWATER HOLD-UP

a. *The Trial of Vanzetti*

THIS trial took place before Judge Webster Thayer at Plymouth. The District Attorney was Frederick G. Katzmänn; he was assisted by William F. Kane. Messrs. J. P. Vahey and J. M. Graham represented Vanzetti. Mr. Vahey was a well-known lawyer and politician of Plymouth, who had close personal and business connections with officials. He later entered into a law partnership with Mr. Katzmänn.

The charge was assault with intent to rob and assault with intent to murder. It was based on an unsuccessful attempt early on the morning of December 24th, 1919, to hold up a truck of the White Shoe Company in the streets of Bridgewater. In this attempt shots were fired at the truck by two men, one of whom used a shotgun. The men escaped in an automobile after their fire was returned by the men on the truck. No one was hurt.

The trial opened with the selection of the jury and the reading of the complaints on June 22nd, 1920. One of the jurors selected was a foreman of the Plymouth Cordage Company. It will be recalled that in 1916 Vanzetti had been active in a strike at this factory and had not been reemployed after it.

No complete transcript of this trial is in existence but as much as could be authenticated has been reprinted in the supplemental volume of the Holt record.

On June 23rd, Mr. Kane addressed the jury on behalf of the prosecution. His contentions were that Vanzetti had fired the shotgun, that the car used was a seven-passenger 1920 Buick which on April 17th, 1920, had been found in the Manley woods, and that Boda had been seen driving a similar car. Mr. Kane pointed out that when arrested Vanzetti had had in his possession Winchester and Peters 12 gauge shotgun shells, that a similar Winchester shell had been found at the scene of the shooting and such a Peters shell in the Buick car.

The two surviving persons on the truck, Bowles and Cox, and a passer-by, Harding, identified Vanzetti as the man who had fired the shotgun. Their testimony occupied June 23rd and 24th. On the 25th, a Mrs. Brooks said she had noticed Vanzetti at the wheel of a car she had seen and a newsboy, Shaw, said he recognized Vanzetti as the man he had noticed running with

a gun. The testimony of several of these witnesses showed variations from that given at the preliminary hearing, and also from statements made to Pinkerton detectives immediately after the attempted crime. The latter material was not, however, available to the defense for cross-examination of these witnesses. The rest of the 25th was taken up with additional testimony seeking to connect the defendant with the hold-up.

The prosecution rested on Monday, June 28th.

Mr. Graham then made an opening address which outlined the alibi which would be offered as the sole defense, under which sixteen residents of Plymouth, all Italians, testified as to Vanzetti's actions from December 23rd until Christmas Day. No evidence of good character was offered by the defense. No witnesses appeared to say that Vanzetti was not one of the hold-up men. None of the occupants of the trolley car which had been between the bandits' automobile and the pay-roll truck was called by either side. Vanzetti did not take the stand in his own behalf. Statements made by him to the District Attorney after his arrest were, therefore, not used. Statements he made to Stewart about his movements on the evening before the arrest were, however, presented to the jury. Judge Thayer was doubtful whether the fact of Vanzetti's possession of a revolver at the time of his arrest should be presented to the jury. On the afternoon of June 30th he resolved that doubt against the defense.

The summation of neither side has been preserved, nor has, in its entirety, the Judge's charge. That was given on the morning of July 1st. It dealt to some extent with the subject of consciousness of guilt. No exceptions were taken to the charge. The jury retired at 10:50 A. M., returned for additional instructions at 3:40 P. M., and at 4:18 brought in verdicts of guilty on both counts. Sentence was not pronounced until August 16th, at which time Mr. Katzmann asked for a severe sentence as warning, and Mr. Vahey pleaded for leniency because no one had been hurt and because this was a first offense. Judge Thayer, after speaking at length about the case, (his remarks have not been preserved) imposed sentence of from 12 to 15 years. Exceptions to the Supreme Judicial Court were filed, but never perfected.

A more detailed consideration of the evidence follows.

Vanzetti was identified by Bowles, Cox, Harding, Mrs. Brooks and Shaw. An attempt was also made to connect him with a cap which Casey had seen on one of the bandits.

In connection with this identification testimony the statement given to the Pinkerton detective by JOHN E. GRAVES who died before Vanzetti was arrested, should be considered. Graves said the man with the shotgun had fired four shots, was five feet six inches tall, weighed 145 pounds, was 35 years old, had a black moustache, looked like a Greek and wore neither hat, overcoat, nor collar, but had on a dark suit and a white shirt.

BENJAMIN F. BOWLES, guard and police constable, described the tall, hatless man with the shotgun as being five feet eight inches in height, with a high forehead and red cheeks, but disagreed with Graves by saying he

wore a long coat. He pictured him as having high cheek bones and a trimmed moustache, very dark and bushy, and he was positive the man was Vanzetti.

At the preliminary hearing he had differently described the moustache as "croppy" and had said there had been a "glaring look" in the assailant's eyes and that his hair had stood up a little. On cross-examination at the trial, when asked about this use of the word croppy, Bowles said "I did not stop to think. I meant trimmed instead of cropped" [65*]. To the Pinkerton detectives he had directly after the attempted crime described the moustache as "black closely cropped."

He called the car a dark Buick and said it was the same he had later seen at Brockton. On cross-examination he was unable to state whether on the day of the hold-up he had known its make. To the Pinkerton detective he had on that day described it only as a black touring car.

At the preliminary hearing Bowles had testified that he had been intent on protecting himself from the man with the revolver who was pointing it at him; but on cross-examination at the trial he said he had shot at the man with the gun, and that the one with the revolver had not been in sight when he went by.

He also testified there that he had had to take the wheel of the truck because the driver had dropped to the bottom of it, but the driver himself had told the Pinkerton men that Bowles had gotten excited, had caught hold of the wheel, and had run the car into a telegraph pole.

ALFRED E. COX, JR., the guard, described the machine as a heavy touring car with curtains down and the man with a shotgun as "of medium complexion, with prominent cheek bones, rather high; he had a short, well trimmed moustache. That is, not what you would term an awful small moustache, but short" [75*]. He added that he had a high forehead and hair which stood up. Asked if he had seen the man since, he said: "I feel that I have." [77*]

On cross-examination Cox was no more willing than at the preliminary hearing to be positive about his identification, but he said of Vanzetti that he "answers the man's description; he looks like the man." At Brockton he had said he doubted whether Vanzetti was the man but at the trial he denied having expressed a doubt at Brockton, although he admitted having hesitated about his identification.

On cross-examination he said he had at Brockton described the moustache "as short and well trimmed"; he admitted that he might have used the word croppy on that occasion and that he had left it out at the trial "because I don't know at this moment just what it means" [81*]. He also testified that before the trial he had had an argument with someone about it, but he denied having been influenced by Bowles' testimony. His testimony at the preliminary hearing had been that it was "a short, croppy moustache.—Well trimmed." [7*]

At the trial Cox thought he had testified at Brockton that the man was five feet eight inches tall whereas he had described him on that occasion as "not a heavy man nor a tall one." Nor did he remember having then de-

scribed the man with the shotgun as "the short fellow." Such in fact had been his testimony.

On redirect examination he said "he looks enough like the man to be the same man" but was apparently about to make some comment concerning his opportunity for observation when he was interrupted by the Court. He finally said: "I personally felt satisfied that he was the man." [88*, 89*]

To the Pinkerton detectives Cox had said the man was five feet eight inches tall, weighed 150 pounds, was 40 years old and had "a closely cropped moustache which might have been slightly gray." [365*]

It appears also that at Brockton this witness had said the man with the shotgun had just dropped a dark soft felt hat and that this point was not brought up at all at the trial.

FRANK W. HARDING, who, when the trial took place, was an employee of the Shoe Company, but who had at the time of the shooting been employed in a garage, testified that on the morning of the hold-up, while he was walking on Broad Street, he had noticed running behind him a man with a gun. He described this person as dark, with a hard, broad face, a round, bullet-shaped head, high cheek bones and a heavy dark moustache which had been trimmed, and said he wore a long coat but no hat. He testified that the man had come running along Broad Street in the same direction in which he himself was going and that when the man reached a point a few feet beyond him, he bent his knees and fired at the truck. Harding had been taken to see Vanzetti at the Brockton police station and had at once identified him as the man. [90*-95*]

On cross-examination he said this man was a magnetic sort of fellow, that his back had been turned to him while shooting and that, while running up, he had been about five or six feet out in the street. He did not think that at Brockton he had described the moustache as croppy. His testimony at that time had been "it seemed to be croppy. Not little and small, but one trimmed up" [23*]. In the description given at Brockton Harding had said nothing about the man's having a broad face or a bullet-shaped head.

At the trial he described the car as a dark, seven-passenger Buick with curtains down. He said he had taken its number and given it to Stewart and that the car was the one which was standing outside the courthouse. On cross-examination he was asked nothing about it. He had described it to the Pinkerton detective as a black Hudson Six.

To this detective he had pictured the man with the gun as slim, five feet ten inches tall, wearing a long black overcoat and a black derby hat. He had said he had not gotten much of a look at his face and had stated he was a Pole. This remark of Harding's, as well as the statements obtained by the detectives from the men on the truck, were all taken on the afternoon of December 24th. On January 3rd Harding told the Pinkerton men he had just seen two Italians of build similar to those at the hold-up and that one was wearing "a black shiny overcoat exactly like the one worn by the tall gun man," that he had gotten a good look at the faces of these Italians "but as he did not see them on the day of the hold-up he was unable to say

whether they were the gunmen or not." He said the taller of the Italians he had just seen had a small, short-cropped moustache. [388*, 389*]

MRS. GEORGINA F. BROOKS, who on the morning of the crime had been walking with her five year old son towards the railroad station at Bridgewater, had noticed an automobile as she crossed Broad Street. She described the man at the wheel as a foreigner of dark complexion, with a moustache of medium size, who wore a dark, soft hat and who was watching her as she walked along. Shown four men in a row at Brockton she picked out Vanzetti as the man she had observed in the automobile. She also stated she had seen the shooting from the railroad station and that after it was over she had gone to the truck.

On cross-examination she said there had been four men in the car and that they had all watched her; but she was able to describe none of them except the driver. She said she had kept looking back at the machine all the way to the station. She admitted that at the time of the trial it was impossible to see from the station to the place of the shooting, but she said this change in vista was due to the seasonal change in the foliage.

This witness had given at Brockton substantially the same testimony as at the trial, except that she had on the former occasion described the man's moustache as being just like Vanzetti's. Also, whereas at Brockton she had testified to having seen the car coming down near the station, at the trial she said she had not seen it after the shooting. This witness had not been interviewed by the Pinkerton detectives.

MAYNARD FREEMAN SHAW, a 14 year old school boy, had been delivering papers on Broad Street on the morning of the hold-up and had noticed a large touring car. At the trial he said it was a Buick, but remarked that he had not known at the time what type of car it was and had judged it a Hudson or a Buick, or some other make, the name of which he had forgotten. He said he had obtained a fleeting glance of a running man without a hat, carrying a gun. "I could tell he was a foreigner, I could tell by the way he ran," he said. He described the man as having very little hair and a moustache which was dark but not black, and which was well kept. This man he identified as Vanzetti. [128*, 132*]

The witness was cross-examined about his statement that he could recognize foreigners by the way they ran and finally said that the man might have been anything except a Japanese, a Chinese, an African or an American. He said he had talked on the same day about what he had seen and had told Stewart about it on May 17th, 1920. He had been asked to look at Vanzetti on the day of the preliminary hearing, he said, but had not then been called as a witness. Shaw was never interviewed by the Pinkerton detectives.

GEORGE H. HASSAM, garage keeper of Needham, testified that the number plates of the car used at Bridgewater were his and that they had last been seen in his garage on Sunday, December 21st, 1919. A day or two after that, he said, an Italian had come to borrow some number plates. He described this man as five feet seven inches tall, swarthy, with a short, close-

cropped moustache, a man of perhaps thirty-five or thirty-eight years, and said he had never seen him before or since. His picture of this Italian is similar to that given by nearly all the witnesses as the description of the man with the shotgun; yet Hassam was asked nothing directly about Vanzetti.

All these witnesses agreed they had seen a tall man with a dark well-trimmed moustache, whereas before Vanzetti's arrest two of them had described the moustache as closely cropped and another had stated he had not gotten a really good look at the man's face. There was also disagreement among the witnesses as to how the bandit had been clothed.

The prosecution claimed further to connect Vanzetti with the hold-up by means of a cap, some shells, the Buick car, and Mike Boda.

RICHARD GRANT CASEY, the twenty year old son of a storekeeper, testified that on the day in question he had noticed a large dark late 1919 Buick coming down Pearl Street. He described the driver as a dark Italian, smaller than the man next him, with a short, well-trimmed moustache and a prominent nose, and said he had worn a dark, soft hat. He said he had never seen this man again. He had not noticed the face of the person next the driver but described him as taller than the driver and wearing a light brown cap, which was like the one the witness had picked out from six shown him by Chief Stewart. The cap he had before selected was now shown him and he said it "appeared to be on this man in the machine" [106*, 107*]. Chief Stewart later testified he had taken it from Vanzetti's room on May 11th, 1920.

On cross-examination Casey was unable to say whether the man with the cap had had a moustache or not. He was not sure when he had first told Stewart the car was a Buick, and said it might have been in April, 1920. On redirect examination he said it was a day or two after the hold-up that he had told him it was a seven-passenger Buick and that the car outside the court seemed a lot like the one he had seen on December 24th. He was able to point out nothing distinctive about the automobile. On redirect examination he said the driver had on "a black velour hat or a black soft hat." [111*]

That it was a Buick was testified to by JOHN HERBERT KING, who, while dressing on the morning of the hold-up, had seen it from an upstairs bedroom.

DR. JOHN M. MURPHY, who saw the car right after the shooting, did not state of what make it was. He testified he had seen a man with a shotgun get into the car, that this man might have worn a cap but not a hat, and that he had not noticed his face. After the car left he had found on the street an empty 12 gauge Winchester shell, and on this he had placed a mark.

Four shells, of which one was a Winchester, and the other three Peters, were found on Vanzetti at the time of his arrest.

CAPTAIN WILLIAM H. PROCTOR, expert for the State Police, testified that some 12 gauge Winchester shells had on them the word "Repeater" and others the word "Leader." He was shown the shells found on Vanzetti but the record does not indicate clearly whether or not he was also shown the one picked up by Dr. Murphy. Proctor did not state what were the markings

on any of the shells shown him. No proof was offered at the trial that any Peters shell had been found in the Buick car, although reference to this had been made in the opening to the jury.

NAPOLEON J. ENSHER, an Armenian farmer, testified that he had once, in the spring of 1920, seen Boda in a dark, large Buick automobile. [143*]

MICHAEL E. STEWART testified that when Vanzetti was arrested he took a statement from him. The substance of this statement was read to the jury but certain questions about radicalism were eliminated. In it Vanzetti said he had gone to Bridgewater with a friend to see Pappi, and denied having known Boda and having seen a motor cycle there.

During discussion in the absence of the jury concerning the admissibility of this statement, Mr. Katzmman conceded that he had nothing by which to connect Sacco with the hold-up and that he cared nothing about Pappi except as a means by which to demonstrate the falsity of Vanzetti's explanation. Judge Thayer remarked that the only thing which impressed him was Vanzetti's denial that he had ever been in Bridgewater before the night of his arrest, which untruth, he argued, would be evidence of consciousness of guilt. Mr. Katzmman said he wanted to show that Vanzetti's denial of acquaintance with Boda and his explanation of what he had been doing when arrested were both false. Judge Thayer asked whether there was any evidence to connect Boda with the hold-up. Mr. Katzmman's answer was, that Boda fitted the description of the smaller man with the Charlie Chaplin moustache and the velour hat, and that he had a Buick car, "not the Buick car, but a Buick car answering this type." [157*-159*]

Chief Stewart described Boda as a swarthy man with a long face and a small black moustache, who was five feet three inches tall and wore a green velour hat. He said he had seen him on April 20th, 1920, in the Coacci house in West Bridgewater. He had talked with Boda for about an hour. Stewart testified that he had since made extensive inquiries for the man but had not found him. He gave a very detailed description of Boda's moustache:

"What sort of a moustache was it other than being black?—It is what I call a well kept moustache, not a real heavy bushy moustache. It is not what I call a Charlie Chaplin moustache and it is not what I call a croppy moustache. It had the appearance of a moustache whose owner had a little pride in it and kept it looking right; it was not long on the ends." [180*]

OFFICER BROUILLARD testified that he had been present with Stewart when Boda was being interviewed and he, too, gave a description of Boda.

RUTH C. JOHNSON, wife of the garage-keeper of West Bridgewater, testified that Boda had called at her home on the night of May 5th and that there had been two men in his company. One of them was Sacco, whom with two others, she had seen again the following day at the police station. She had not seen Vanzetti that night and was unable to describe the third man who had been with Sacco. She testified that while going to a neighbor's house to telephone she had noticed that two men were following her and

that they had likewise followed her on her way back. On cross-examination she said she had not gotten a good look at them until on her return. Although she had not known whether or not they were the same men she had noticed on her way out, she said on redirect examination that she thought Sacco had followed her on both occasions.

SIMON E. JOHNSON, her husband, testified that an Overland car of Boda's had been towed to his garage on April 19th, 1920. He gave a description of Boda as small with a dark small moustache. He said he had seen him on the night of May 5th, on which occasion, after some talk, which Johnson was not permitted to repeat, Boda had gotten into the motor cycle and driven off. Johnson had noticed two other men walking towards the motor cycle.

OFFICER CONNOLLY testified that when Vanzetti was arrested Sacco was with him. After considerable discussion between the Court and counsel he was permitted to testify about the shells found in Vanzetti's possession.

AUSTIN C. COLE, conductor of the trolley car aboard which Sacco and Vanzetti were taken up, testified that he had seen both Sacco and Vanzetti board his trolley car in West Bridgewater one day during the week before April 19th.

After the prosecution rested Mr. Vahey made a motion to strike out the testimony of Mr. and Mrs. Johnson with reference to the events of May 5th, on the ground that their evidence was insufficient on which to base any claim that defendant had then shown consciousness of guilt. This motion and the discussion which followed took place in the absence of the jury. Judge Thayer asked the District Attorney whether any one had identified Boda. Katzmman claimed that Casey had done so in his redirect examination and compared that witness's description of the man at the wheel with Stewart's and Johnson's descriptions of Boda. Casey, of course, had not been asked anything about Boda. Mr. Katzmman added that Boda had no importance in connection with December 24th if the Johnson testimony were excluded. He said nevertheless that the jury might well infer Boda had driven the car at Bridgewater and also that the Boda episode was another evidence of Vanzetti's consciousness of guilt.

At the later trial for the South Braintree murders the same claim about Boda and the Buick car was made in the opening statement and the jury in that case was taken to view the Coacci shed. However, while Ensher was on the stand in that trial, Judge Thayer had doubts about the relevancy of his testimony; and after a lengthy discussion in the absence of the jury, he was not permitted to testify. On this occasion Mr. Williams said he had no evidence that Boda had been in South Braintree. The jury was finally instructed to disregard the view of the shed.¹

No explanation was ever made as to why the police had not arrested Boda. Before the Lowell Committee, Mr. Katzmman said that at the time of this first trial he had thought Boda might be able to give information because he was supposed to have been seen driving the "murder" car. Defendants' counsel stated to the Lowell Committee that Boda had returned

¹ See pp. 54 to 57.

to Italy but would come back if his expenses were paid. They also gave his address in Italy. These additional connecting links were, except for Casey's testimony about the cap, never clearly developed by the prosecution, but left rather vaguely hanging over the defendant. Judge Thayer thought the matter of consciousness of guilt was for the jury. He refused to rule on a motion to dismiss the indictment charging intent to murder until the defense rested. Stewart was then recalled to describe the tracks he noticed in the Manley woods when the car was found there. He also said he did not think the car had been out in the woods all winter.

In the opening statement for the defense Mr. Graham said he would prove by many witnesses that Vanzetti had been selling eels on Wednesday, December 24th, and that his moustache had always been, as at the time of the trial, a flowing one. He referred to a custom among Italians of eating eels on Christmas Eve. The existence of this custom was admitted by the prosecution.

The testimony of all the Italian witnesses for the defendant seems to have been taken through an interpreter with whom, at various times during the trial, there were difficulties.

The first witness for the defense was VITTORIA PAPA. This was the man to whom Vanzetti had referred as Pappi. Papa testified to having known Vanzetti in Plymouth. He said he had not let the defendant know where he was living in East Bridgewater in spite of the fact that he had expected to be visited by him at some time.

The witnesses to Vanzetti's alibi were: Mrs. Fortini, Balboni, Di Carli, Bastoni, Rosa Balboni, young Breni, Mrs. Malaquci, Mrs. Bonjionanni, Mrs. Fiocchi, Mrs. Borsari and Longhi. Corroboration of some of the matters to which these people testified was furnished by Breni and his wife, by Mrs. Forni, by Sassi and by Miss Christophori.

MRS. MARY FORTINI, who had been Vanzetti's landlady, testified that at the request of Balboni, she had called Vanzetti at about 6:15 on the morning of December 24th, 1919, and that she had seen him getting fish ready for Balboni and had seen Balboni take it away. She said that on the night before the 24th she had seen Vanzetti, between 8:00 and 12:00 o'clock, preparing the fish in the kitchen of her house. On the 24th she had again noticed him near 8:00 in the morning, had seen him go out at about 9:00 with the Breni boy, come back at noon to eat and leave again after eating. He had then gone out again with fish and had returned at about 5:30, she said.

On cross-examination Mrs. Fortini was unable to fix the date on which Vanzetti had been arrested nor was she able to state at what time on various dates specified by the cross-examiner he had arisen. She said she had not given the matter any thought until after Vanzetti's arrest; and that since then she had talked it over with the people outside, meaning the other witnesses. She was cross-examined about what she had told the police when they came to her house after Vanzetti's arrest, and said she had told them the first time to come back again because she did not remember what Vanzetti had been doing. On redirect examination she testified that Vanzetti had

on the 22nd or 23rd of December received a barrel of eels by express.

CARLO BALBONI, a fireman at the Cordage works, testified that on his way home from night work, he had received two pounds of eels from Vanzetti early on the morning of December 24th. This was the only time he had ever bought eels from Vanzetti. On cross-examination he said he thought the defendant had been arrested during the latter part of April. Asked if he was a friend of Vanzetti's he said "I have not many friends; I am a friend just of myself." [239*]

JOHN DI CARLI, a shoemaker, testified that on the morning of the 24th he had opened his store at about 7:00 o'clock and had shortly thereafter received eels from Vanzetti. He said he was a friend of his "just the same as the rest of them" [240*]. On cross-examination he was asked whether he had ever heard Vanzetti make any speeches, or whether he had ever discussed with him any questions of government or of the poor and the rich, and answered in the negative.

ENRICO BASTONI, a baker, said that he had seen Vanzetti shortly after 8:00 o'clock on the morning in question, that the defendant had asked him for the loan of his horse, and that he had refused on account of the approaching holiday. He also said he had seen Vanzetti again in the afternoon and that when he went back home in the evening he found there some eels which Vanzetti had delivered.

MRS. ROSA BALBONI, wife of Joseph Balboni, a driver for the Cordage Company, testified that Vanzetti had delivered fish to her house on the afternoon of the 24th and that at a few minutes after seven that morning, she had seen him in Bastoni's shop. The answers of this witness were often confused in the rendition because the interpreter appeared not to understand her dialect.

BELTRANDO BRENI,¹ son of friends of Vanzetti's, who was thirteen years old at the time of the trial, testified that on the night of December 23rd, 1919, Vanzetti had asked him to help deliver the fish the next day, and that during that evening, while Vanzetti was at the Breni house, two men had brought in half a pig. He recounted how, the next morning, after having had another conversation with Vanzetti and a talk with his father, he had looked for his rubbers, found them, joined Vanzetti at the latter's home, and then delivered eels to a number of people. It was about 8:00 o'clock when he met Vanzetti. He named Mrs. Bonjionanni and Miss Christophori as people to whom he had delivered eels. He said he continued with his work until nearly two o'clock. That evening he saw Vanzetti again and on the following day he talked with him about a Christmas present which Vanzetti had made him of two half-dollars.

This witness was subjected to a lengthy cross-examination in which the number of times he had told his story and to whom he had told it was especially stressed. Mr. Katzmann suggested that the story had been taught him. The boy admitted he had often spoken about it to his parents and that he had learnt it like a piece at school; also that he had sometimes told

¹ In the record of the Braintree case the name of this family is given as Brini.

it in the presence of all the witnesses who were in attendance at the trial. On redirect examination, however, he denied that he had ever been instructed to tell about anything which had not happened to his own knowledge.

He said, on cross-examination, that he had first told his story shortly after Vanzetti's arrest, perhaps on the day following it, but he admitted that the newspapers had at that time said nothing about Vanzetti's having been arrested for any crime committed on December 24th. On redirect examination he said he had not told his story to his mother until after he had heard that Vanzetti was being held in connection with the Bridgewater hold-up.

He was asked on cross-examination how he knew when the pig had been brought into the house and said he had figured it out that the 22nd was a Tuesday or Monday, finally that it was a Tuesday. When it appeared that this was incorrect, since the 22nd was a Monday, Mr. Katzmman tried to get the boy to admit that the error necessitated a change in all the dates in his testimony; Breni refused to admit that such was the case.

There was also discussion about the length of time he had worked on that day. At first he said it had been about four hours and that he had finished after one o'clock. Upon its being pointed out that from 8:00 o'clock until after 1:00 was considerably more than four hours, he said he had worked four hours or more, but did not know just how much more.

MRS. TERESE MALAQUCI said she had bought eels from Vanzetti which he delivered between 7:00 and 8:00 o'clock on the morning of the 24th. This witness said she had never told her story to anyone before testifying in court.

MRS. ADELADI BONJIONANNI, wife of a worker in the Cordage plant, testified that she had received eels between 9:00 and 10:00 o'clock on the morning of the 24th from the Breni boy, and that he had no change for her, so that she had gone out and paid Vanzetti himself. She said this was the only time she had ever bought eels from the defendant. On cross-examination she said she had salted the fish and eaten them the same night. She was unable to state what she had been doing between 9:00 and 10:00 o'clock on various days selected by Mr. Katzmman.

MRS. MARGARETTA FIOCHI, who lived next door to Mrs. Bonjionanni, gave substantially the same testimony as the latter. On cross-examination she said she had ordered the eels on Sunday to be delivered on Tuesday, because "if I kept them in salt longer it would be more delicious to eat." [291*] She added, they had been delivered a day late.

MRS. EMMA BORSARI, wife of another Cordage worker, likewise testified to having ordered eels on Sunday and having received them on the 24th, on the morning of that day, and said this was the only occasion on which she had bought eels from Vanzetti. She was not cross-examined.

VINCENT LOUIS LONGHI, a weaver, remembered having seen Vanzetti come to his house a few minutes after 7:00 on the morning of the 24th. There had been some conversation between Vanzetti and the witness's mother, as the witness was leaving the house. At the time of the trial the mother herself was sick. On cross-examination Longhi said he had not had his attention called to

the matter until the very morning of his testifying but that he remembered Vanzetti's having come on the same day on which they had eaten the eels and that this was Christmas Eve. He was sure the eels had not been brought to the house on the previous day.

VINCENZO BRENI, father of Beltrando, testified that he had been at work at the Cordage plant on the night of the 23rd when he expected to receive part of a pig, that the next morning he had had a talk with his boy about selling fish, but that he was not sure whether at the time he had seen Vanzetti. He said he had seen him on the night of the 24th and also the next day.

Breni's wife, MRS. ALFONSINI BRENI, testified that the pig had been delivered on the night of the 23rd while Vanzetti was at her house. She said that on that date she had worked during the day, but that she had seen Vanzetti in her home on the evening of the 24th. After having learned of his arrest in connection with the Bridgewater affair, her boy, she said, had asked: "Don't you remember, mother, that the night before he came down and called me to go out to sell fish?" [306*]. She denied having ever suggested to her son anything to which he should testify. Vanzetti, she said, had put two half dollars into the stocking of each of her children on Christmas Eve.

On cross-examination this witness testified that Vanzetti was a very good friend of all her family. She said she had bought eels from him which he delivered on the evening of the 23rd and which she prepared that evening. She also said the longer the eels are salted, the better they taste, but that she liked them even if salted only two or three hours.

That Vanzetti was at the Breni home on the night of the 24th was also testified to by MRS. ROSE FORNI. Mrs. Forni lived in the Breni house and said she had been in the cellar during the day of the 23rd but had not then seen any pig.

The purchase of the pig by Breni was testified to by MATTHEW SASSI, who said he had bought the pig from a man named Manter and had sold half to Breni. On cross-examination he said he was friendly with Vanzetti and Breni and had often called at the latter's house and eaten there. He said he had never seen Vanzetti take a drink. A stipulation was read to the effect that EDWARD MANTER, had he been called, would have testified that he had killed the pig the day before Christmas and had delivered part of it to Sassi and part to Breni. It was said by counsel: "The date we cannot fix."

There was also testimony by MISS ESTHER E. G. CHRISTOPHORI, eighteen years old at the time of the trial, to the effect that she had, a little after 11:00 o'clock on December 24th, received some eels from the Breni boy.

That Vanzetti's moustache had always been long and flowing was testified to by the following witnesses: Mrs. Fortini, Breni, Mrs. Breni, and the Breni boy, Bastoni, Mrs. Bonjionanni, Mrs. Fiochi, Mrs. Forni, and four other witnesses, whose testimony requires particular notice.

JOHN VERNAZANO, a barber, who had known Vanzetti and had served him for six years, said that he had never cut or trimmed Vanzetti's moustache except to take off two or three hairs at the top of his lip and that he

had never seen Vanzetti with a trimmed moustache. "Always he had a long moustache" [313*]. On cross-examination Vernazano was asked to locate and describe the three hairs and he did so by making a drawing of each hair.

ANDREW CHRISTOPHORI, who was in the shoe business and "also express business and other things," had known Vanzetti for five years. He testified that he, too, had never seen his moustache trimmed, and that since they were opposite neighbors, he had been in the way of seeing the defendant often. He was sure Vanzetti had never had a short, croppy moustache although he was unable to say that he had seen Vanzetti on December 24th or for a week thereafter. This witness was asked to describe the moustaches of a number of different people, among them William M. Douglass, proprietor of the Samoset Hotel. He said that Douglass had a short, light moustache. In contradiction of this testimony the prosecution produced Mr. Douglass who said he had never had a moustache during the past ten years.

JOHN GAULT, a Plymouth police officer, said he had observed Vanzetti and had never noticed any difference in his moustache. On cross-examination he was unable to say whether the moustache had been trimmed on December 24th and stated he had taken no particular notice of it.

JOSEPH W. SCHILLING, another Plymouth police officer, also testified that he had never noticed any change in Vanzetti's moustache. He could not pick out a particular date on which he had observed it, but said that it always looked the same to him.

At the conclusion of the testimony Judge Thayer told the jury he had had some doubt about the competency of testimony that a loaded revolver had been found on Vanzetti when arrested, but that he now concluded such testimony should be admitted, and that in his charge he would explain its bearing. It was then agreed that Connolly, if recalled, would have testified to the finding of such a revolver. No testimony was given of any attempt on the part of Vanzetti to draw this gun at the time of his arrest.¹

At the end of the Commonwealth's case a motion had been made to dismiss the indictment charging intent to murder for lack of proof that the shot-gun had been sufficiently powerful to result in death. This motion was denied by Judge Thayer with a suggestion that it be renewed at the end of the entire case. The record does not show whether or not the motion was so renewed at the close of the trial.

What has been preserved of the charge, with the proceedings resulting in the verdict, follows:

"So that, gentlemen, to sum up, it means: First, what is the fact and what is the truth,—What took place at the Johnson house that night? What statements were made, if any, to Chief Stewart by the defendant? You must determine first what was said and what took place, and then, having determined that, you must find out whether the acts and statements and the conduct of the defendant had any causal relationship with the alleged crimes. If there was no causal relationship as I have told you between Vanzetti's carrying of a loaded revolver and the alleged crimes, why it is of

¹ Such testimony was given at the later trial for murder. See page 57.

no consequence. It has no place in the jury room, if you do not find such causal relationship; and it is equally true with reference to the representations made by the defendant to Chief Stewart, if you find he made such representations.

"Now to sum up, what is the fact? What does all this mean?—and when you have determined what it all means, then that simply means this—that it is a fact the same as other facts which you will take into consideration as bearing upon the question of the guilt or the innocence of the defendant. As I have told you, if in your final analysis you find it has no bearing, no connection between the two things disregard it. If you find that it has, give it what weight you think it is entitled to as bearing upon the question of the guilt of the defendant.

"Now, gentlemen, I think that covers most of the claims of the Commonwealth. I'll repeat what I have already said—they are simply claims. What weight should be given them rests with you. The defendant denies the claims, not but what they are made, but claims that you should not reach the same conclusion that has been reached by counsel for the Commonwealth. So you must determine what is the fact and what is the truth.

"The defendant has set up a defense on an alibi, which word means when translated—elsewhere; which means in its probative effect if established that the defendant could not have committed the alleged crimes because he was somewhere else. In other words, the defendant says that he could not have committed the alleged crimes because at the time he was in Plymouth. If you find such to be the fact, that is an end of this case. If he was in Plymouth at 7:15 or 7:20 or thereabouts he could not have been in Bridgewater. That, gentlemen, again is a question of fact. The defendant maintains that position as strenuously as the Commonwealth maintains its position. The defendant claims such to be a fact, and on the other hand, the counsel Commonwealth strenuously opposes that claim made by the defendant. Now, you must stand between the parties, as I have said, with fairness, with impartiality, and say what [333*] is the fact and what is the truth. Because the witnesses are Italians no inference should be drawn against them. People are supposed to be honest, to be truthful, to be innocent. You have seen them, you have heard them and looked into their faces. You have heard or seen if they have any interest, their motive. You have heard their entire story and now it is for you to say what is the fact, and take the alibi in connection with the testimony of the Commonwealth and then you will say and you must say that the Commonwealth has satisfied you beyond a reasonable doubt that this defendant, first, was present on the morning of December 24th, 1919, that he had a shotgun in his hand and that he fired the shotgun at the men on the truck before you can find him guilty. As I have already said, that is a question of fact which you must determine; the court cannot assist you in any way and you have heard the arguments of the counsel and if the court has not fully and completely or even fairly stated the claim of either counsel that has been made or suggested to you it is your duty in the jury room to consider every suggestion and every argument that has been made by the counsel. Both parties are entitled to that at your hands irrespective of what may have been said by the court. The court only intends to state to you the law in order that you may apply the facts to the law. But whatever counsel have said they have a right to ask you to con-

sider every suggestion and every line of argument that they could make, with the view that you may in the final analysis determine what is the fact and what is the truth.

MR. KATZMANN. The Commonwealth is content.

THE COURT. And now I am about done. Is there any suggestion?

MR. VAHEY. The defendant is content with your Honor's remarks.

THE COURT. Now gentlemen, both sides are satisfied. Now I am about to commit this case into your hands. It is an important case to both sides. All I can ask you is to bring to your aid your highest and best ability, your knowledge of human nature, your knowledge of affairs of the world—your ability to discern the truth. All I can ask of you is to use those faculties and those abilities because that is what you are called upon to do—to render a verdict that is true. That is the meaning of the word—a declaration of truth. Now, gentlemen, you may take this case to yonder jury room, and sacred sanctuary where may the God of Justice and of Truth and Fairness preside over all of your deliberations.

The officers will come forward and be sworn.

[The jury retired at 10:50 A. M. to their room and at 3:40 P. M. they returned to the courtroom for additional instructions. When they entered the room the foreman handed a paper to the court.]

THE COURT. I have been asked the following question by the jury: can we return a verdict of assault with a dangerous weapon, in the indictment of murder? [334*]

As I take it, that question refers to the indictment with three counts in it?

THE FOREMAN. Yes.

THE COURT. My answer is yes: Three counts here as I have already stated to you. One charges the defendant with an assault upon Alfred E. Cox with intent to murder him; the second count charges him with assault upon Earl Graves with intent to murder him. The third count says: 'the jurors afore-said charge the defendant with assault upon Benjamin F. Bowles with intent to murder him.'

"As I told you this morning, if the weapon such as a gun, as has been described in this case, was found to be a dangerous weapon and at the same time you find that the defendant did not intend to kill either of the persons named in each of these counts, you would return the verdict of guilty of an assault with a dangerous weapon. In order to maintain the allegation complete you must find an intent to murder. If it was as I told you, simply an intent to commit an assault with a dangerous weapon with a view of frightening, or with any other purpose other than with an intent to kill, then under such circumstances your verdict would be guilty of an assault with a dangerous weapon. So you see, gentlemen, that depends upon what you find with reference with that one word 'intent.' If he intended to kill him that means murder. A deadly weapon is one likely to produce death or grievous bodily harm. That means something if you find that a gun was an instrument that was liable to cause death or grievous bodily injury. So, gentlemen, all I can say is that if you find to be a fact that the de-

fendant did commit an assault with a dangerous weapon and at the same time did not intend to kill, then you may return a verdict of guilty of an assault with a dangerous weapon. And of course when you return you will be asked with reference to three counts. If you find the defendant guilty of an assault with a dangerous weapon the clerk will probably inquire: 'Under which count?' If you find him guilty only under one count, you will say so; under two counts you will say so; if you find him guilty under three, you will say so.

I want to correct the statement in which I said that if the defendant had a dangerous weapon in his hand and he shot intending to kill, that would be murder. That would not be quite right, because there has been no actual killing. It would be simply an intent to murder in as much as no death followed the intent, and death must follow the intent in order to be murder. Does that answer your question, Mr. Foreman?

THE FOREMAN. I think so, yes.

The Jury then retire again. At 4:18 the Jury came in with its verdict, finding the defendant guilty of an assault with a dangerous weapon with intent to rob; guilty on the first count with assault with intent to murder; and guilty on the second count in the indictment charging defendant with an assault on Earl Graves; guilty on the third count in indict[335*]ment assault upon Benjamin Bowles and guilty of all three counts in the last indictment.

Expressing his thanks and that of the Commonwealth for the Jury's 'splendid and efficient services' in the 'long, tiresome and painful case,' the Judge added: 'Duty requires that cases of this kind must be dealt with and they must be dealt with in accordance with the law because it is necessary that this kind of case should be heard and they should be heard by twelve fair, just and impartial men.' 'You may go to your homes with the feeling that you did respond as the soldier responded to his service when he went across the seas to the call of the Commonwealth. I thank you, gentlemen.' [336*]

Vanzetti is reported to have turned to his friends, and in Italian, to have cried "Courage." Exceptions were filed in the expectation of taking an appeal. The conviction for murder made such step futile.

b. Subsequent Proceedings

As has already been pointed out the reports of the Pinkerton detectives were submitted to Governor Fuller during his investigation of both cases and at the very end counsel found an express receipt which showed that there had been sent to Vanzetti just before Christmas a quantity of eels.

Before the Lowell Committee there was some discussion of this case while Katzmann was on the stand. Also the witness Christophori charged Katzmann with having made a fool of him in the matter of Douglass's moustache, insisting that it had been only recently shaved. President Lowell commented that as Douglass was well known in Plymouth it should have

been easy to show the true facts. William Bernagozzi, an interpreter retained by the defense, also appeared and said that there had been difficulties with the official interpreter and that the way the witnesses appeared to hesitate because the interpreter did not easily understand them had made a bad impression on the jury. He also told how, after the verdict, Vanzetti had blamed his lawyer, Vahey. Mr. Woodbury, an investigator, testified to efforts he had made at Moore's request to get new evidence so as to re-open the case and told how he was rebuffed on account of prejudice against reds.

The Bridgewater case was not discussed in the Committee's report, except for the comment at the end that both crimes seemed to bear the mark of "men inexpert in such crimes." [5378z]

Governor Fuller gave the case more extended notice:

"The next question, and the most vital question of all, is that of the guilt or innocence of the accused. In this connection I reviewed the Bridgewater attempted holdup for which Vanzetti had previously been tried before another jury and found guilty. At this trial Vanzetti did not take the witness stand in his own defense. He waived the privilege of telling his own story to the jury, and did not subject himself to cross examination. Investigating this case, I talked to the counsel for Vanzetti at the Plymouth trial, the jurymen, the trial witnesses, new witnesses, present counsel and Vanzetti. I have talked with the government witnesses who saw the Bridgewater holdup and who identified Vanzetti, and I believe their testimony to be substantially correct. I [5378f] believe with the jury that Vanzetti was guilty and that his trial was fair. I found nothing unusual about this case except, as noted above, that Vanzetti did not testify.

"In the Bridgewater case, practically everyone who witnessed the attempted holdup and who could have identified the bandits identified Vanzetti." [5378g]

c. *The Outlook Confession*

The *Outlook and Independent* for October 21st, 1928 (vol. 150, #9) published a number of articles and an editorial, which dealt with the Bridgewater case. Unfortunately, insufficient care was taken by the editors to verify all their statements of fact. One instance of this, an important one, follows. The introductory editorial states that "at the moment of their arrest, they said they were calling for their friend's car at Johnson's garage in order to use it to transport literature." Had the defendants indeed on their arrest made any such explanation, their radicalism might have been kept out of the Braintree case, since there would then have been no lies to explain away.

The *Outlook* presents an alleged confession by FRANK SILVA, alias Paul Martini. Silva says he and Jimmie Mede had planned the Bridgewater hold-up as early as 1917. After Mede had been sent to jail Silva, at the first available opportunity after the war, carried out the plan with other people.

The confession is highly circumstantial, almost too circumstantial. Ac-

cording to its author the man with the shotgun was "Doggy" Bruno, who had a short moustache. His picture is printed in the *Outlook*. It is difficult, on examining it, to suppose Vanzetti might by anybody have been mistaken for this man. A large Buick touring car was used, the confession goes on to say, for which Silva had on December 22nd stolen number plates from a Needham garage.

In one of the affidavits used on the Medeiros motion, it was stated that Moore had interviewed Silva in the Atlanta Penitentiary and that afterwards Silva (Martini) and Joe Morelli had arranged to create an alibi for April 15th, 1920.¹ There was no mention in this affidavit of the Bridgewater case.

The *Outlook* printed also an affidavit by JIMMIE MEDE who, in 1917, had been running a cigar stand in Boston. Mede said Silva and San Marco had originally planned the Bridgewater job with him and that, while in prison in 1920, San Marco had told him about its execution and about Silva's part in it. He said he had been interviewed by Moore in prison and that he had refused to do anything for fear of jeopardizing his parole; and that once out of prison, he had acted as investigator for Moore until told by the gangsters to keep his hands off. He stated that before the execution of Sacco and Vanzetti he had been interviewed by Governor Fuller. What he told the Governor in his interview has not been stated.

The statements in the *Outlook* were procured by a reformed burglar, JACK CALLAHAN. Callahan stated his reasons for believing the two crimes had been committed by different sets of criminals. He pointed to the skill of the South Braintree job in contrast with the clumsiness of the Bridgewater attempt. Concerning the likelihood of Sacco and Vanzetti's guilt of either, he argued that it was practically unknown for the police to catch two members of a gang without catching any of the others.

There can be no doubt that these two arguments have great importance. They constitute imponderable elements, which, like Vanzetti's personality, cause the investigator, in the absence of evidence of unquestioned weight, to doubt his guilt.

Callahan tells in the magazine how he set about getting his information. The narrative, while of no value for the student of the present case, is interesting insofar as it throws light on the ways of the underworld.

SILAS BENT, newspaper man and writer, took an automobile trip at the request of the editors of the *Outlook* with Silva, Mede and Callahan to Bridgewater and the surrounding territory. He describes how Silva pointed out different places of importance, recognized buildings and indicated where changes had been made since 1919.

In many respects his narrative, indicating as it does Silva's indubitably detailed familiarity with Bridgewater and with the details of the hold-up is an impressive one. There remains, to be sure, the possibility, especially potent since a substantial amount of money was at stake, that Silva learned a good deal for the occasion. Copies of the Bridgewater record have,

¹ See pp. 514, 515.

however, been so difficult to obtain that this suspicion may be unfounded.

In his article Bent discusses the Buick car stolen from Needham where one of the gangsters lived. He says the tip given by a Pinkerton man that this car might have been the one used at the crime was never followed up and adds: "The car stolen at Needham would never contribute certainty to a case against Vanzetti." The reasoning here shows lack of familiarity with the record, since, in each case, the prosecution claimed this very car to be the one that had been used by the bandits.

Bent also says he interviewed the motorman and conductor of the street car which at the time of the shooting had been on Broad Street, and that they both claimed not to have seen the bandits. He argues that this is improbable, and that it indicates on the part of the witnesses unwillingness to tell the truth. It has always been a matter for speculation why the men on the street car had not been interviewed by either the Pinkerton detectives or the police, nor produced by either side as witnesses.

In two important respects Silva's story differs from that of the witnesses at the trial. He says the street car was following the truck, whereas the testimony is clear that the street car was in front of the truck. He says Bowles was seated, not next the driver, as he himself stated he was, but on the side of the car. Both these discrepancies Bent discusses. He says errors such as these are but the natural result of excitement and cites as an example of the same thing the mistake made by Cox about the condition of the curtains on the truck in which he was riding. Much is to be said for this explanation.

There can be no doubt that Silva's knowledge of the case was great and that the opportunities for collecting such knowledge after the event were very slight. It may well be, therefore, that he has told the truth, even though his confession does not itself carry conviction.

Part II. ANALYSIS.

Introductory

THE prosecution relied upon five main points to secure conviction: (1) Testimony of eyewitnesses identifying the defendants as participating in the crime or being present near the scene; (2) Evidence of experts that the bullet which caused the death of the guard, Berardelli, had been fired through Sacco's pistol and that one of the shells found near the scene of the crime had likewise been fired through that pistol; (3) That a cap found at the scene of the crime had belonged to Sacco and had been dropped by him; (4) That the revolver found upon Vanzetti when arrested had been taken by Sacco from the body of Berardelli; (5) That certain acts of the defendants and falsehoods told by them showed consciousness of guilt. The evidence in support of these claims and the answering contentions of the defense will be analyzed and discussed in the succeeding pages. Under each of the topics will be treated not only the evidence at the trial but also the new evidence later produced. The various decisions of the courts and the reports of Governor Fuller and the Lowell Committee will be taken up as they relate to the various points.

The separate contentions of the defense were threefold, although only the first was raised at the trial: (6) That both defendants were at the time of the crimes present elsewhere and so could not have committed the crimes; (7) That, as confessed by Medeiros, the crimes were committed by others, the Morelli gang of Providence; (8) That Judge Thayer was prejudiced against the defendants because of their radicalism so that neither the trial nor the subsequent proceedings were fair.

I

IDENTIFICATION TESTIMONY¹

- a. Testimony Relating to Vanzetti.
 1. Faulkner—2. Dolbeare—3. Levangie—4. Reed—5. Cole, Scavitto, Hawley—6. Summary.
- b. Testimony Relating to Sacco.
 1. Andrews—2. Tracy—3. Heron—4. Pelser—5. Splaine—6. Devlin—7. Goodridge—8. Summary.
- c. Prosecution Witnesses who did not Identify.
 1. Behrsin—2. Bostock—3. Wade—4. McGlone—5. Langlois—6. Carri-gan—7. De Beradinis—8. Summary.
- d. The Witnesses for the Defendants.
 1. Campbell—2. Novelli—3. Frantello—4. Foley—5. Falcone—6. Is-corra—7. Cerro—8. Gudierres—9. Liscomb—10. Burke—11. Peirce—12. Ferguson—13. O'Neil—14. Olsen—15. Damato—16. Magnerelli—17. D. DiBona—18. Antonello—19. Frabizio—20. T. DiBona—21. Gatti—22. D. Di Bona—23. Cellucci—24. Chase—25. Dorr—26. Summary.
- e. Discussion by Counsel and the Judge.
- f. Witnesses who did not Testify at the Trial.
 1. Gould—2. Kennedy and Hayes—3. C. Di Bona—4. Hewins—5. Tat-tillo [Packard]—6. Inquest Witnesses.
- g. The Report of the Lowell Committee.
- h. Summary.

a. Testimony Relating to Vanzetti

No one claimed to have seen Vanzetti during the actual shooting. Four witnesses, Faulkner, Dolbeare, Levangie and Reed, identified him as having been near the scene of the crime.

1. JOHN W. FAULKNER, a pattern maker of Cohasset, had boarded a train for Boston on the line from Plymouth at 9:20 on the morning of April 15th. He was bound for the post hospital at the Watertown Arsenal for treat-ment to an injured hand. He said he had been sitting in a combination smok-ing and baggage car and that as the train entered East Weymouth, a man sitting next him had remarked that the man behind wanted to know if that was East Braintree. He had then looked at this man behind:

"What kind of a looking man was that?—Why, he looked like a foreigner, with a black mustache, and cheek bones.

Notice anything else about him?—He had a felt hat on, kind of old clothes." [426]

¹ See plan facing p. 342.

He had talked with the man, he said, and had seen him get off at East Braintree carrying a leather bag, at about ten o'clock. He identified Vanzetti as the man:

"Are you sure that is the man you saw in the train that day?—That is the man." [427]

On cross-examination by Mr. McAnarney, Faulkner stated that at each station along the line (East Weymouth, Weymouth Heights, Weymouth) this passenger had leaned over and asked whether that was East Braintree [429–31]. Questioned about his familiarity with Italians, Faulkner testified:

"Well, the day before, did you see any Italians get on that train?—I didn't notice any.

Have you ever seen any Italians get on that train? Did you ever during that month of April?—Yes.

When?—I don't know the dates.

How frequently?—Why, I couldn't say. Perhaps once or twice a week.

Not in the vernacular—You have heard the old saying, 'All coons look alike to me'—but most Italians look alike? Some Italians look a good deal alike?—There is a difference. Some are big and some are small——

I know, a big Italian don't look like a small one, not as a rule, but two small Italians look a good deal alike?—There is a difference in them. You might get two alike, and two not alike.

Have you ever worked with Italians?—No, sir." [432]

The witness stated that he had not been interviewed by any one on behalf of the government until July 20th, 1920. [433]

Under cross-examination by Mr. Moore he said he had not noticed the man who first spoke to him and that he was unable to describe him in any way. [434] He testified that he had at the time said nothing to any one about the person he identified as Vanzetti:

"Then, did it attract any particular attention on your part?—Why, when I saw the man was so nervous, I looked out to see who he was at the depot. And you saw nothing out there?—I saw this man that got off with the bag.

Did you make any comment about his nervousness?—No.

Did any one make any comment to you?—Not to my knowledge.

Well, you—— —I say, I don't remember as they did.

You called nobody's attention to it?—No.

Nobody called your attention to it?—No." [435]

He said he did not think the man who had first spoken to him was Italian; he would not have known him if he had seen him in Court. Mr. Moore asked an unidentified man in the courtroom to get up:

"Is that the man right there [indicating] that sat next to you?—I never saw the gentleman, to my knowledge.

Was he sitting next to you?—Sitting on my left, yes.

I say, that gentleman was sitting at your left?—I did not say that gentleman.

I say, he was sitting on your left, was he?—I don't know.

You don't know?—No.

You haven't any impression or idea whether he was or not, have you?—No, I have not.

I see. Was the man sitting next to you as large a man as that gentleman?—I don't remember.

No impression at all?—No." [437]

He stated that he had been sent for by the District Attorney in July, 1920. On that occasion he had been taken to the jail and shown five men but he did not know whether any of these except the defendant were Italians [437], nor did he remember whether any of them had had a moustache. He admitted that he had seen a picture of Vanzetti in the newspaper before this visit to the jail. He was then questioned:

"Did you mention to anybody that you knew that man?—I do not remember as I did.

Did you think that you did?—[No response audible to stenographer.]

You didn't, did you?—Now, I am going to answer these questions, not you. [438]

That is all right. You answer. That is just what I want you to do. Did you identify the man in the newspaper picture?—Why, yes.

Who did you tell it was the man?—Who did I tell?

Yes.—Nobody, to my knowledge.

All right. Now, you saw the pictures in the newspaper approximately around May 6th, 7th or 8th, around those dates, didn't you? Right after the arrest of the defendant?—I saw a picture, I do not know the date of it.

Well, around the time of the arrest?—I do not remember. I seen a picture in the paper.

I see. Now, were those pictures at the time you saw them, did you say to anybody that you identified them?—I do not remember that I did.

Well, do you say you did not, or will you say you did?—I did not." [439]

The witness could not describe the jailer whom he had seen that day except to say that he had had a round face. Beside the man with the bag he remembered no one whom he had seen on the train on the day of the shooting except the conductor, and him he did not know by name [440]. He had noticed no one else on the platform at East Braintree either. [441]

On redirect examination Faulkner was asked how he fixed the date and he said:

"I fix it because I expected to go to work very soon. I expected my injury would be over soon. I had been out then, April." [441]

He was then asked if he had been aware of the shooting the next day, but, upon objection by the defense, the question was not answered. The next question was:

"Is there any other reason why you recall the occurrences of the day, April 15?—No, sir." [442]

Asked whether something had been said by the man about "anything being on" that day, Faulkner answered in the negative. His attention was then again called to the South Braintree shootings:

"What effect, if any, did the South Braintree shooting have upon your mind?

THE WITNESS. Well, it had that much on my mind that I thought that was one of the crowd that came up in the train with me. [443] . . .

When did you have that thought?—Why, as soon as I read the paper.

That was when?—Why, I think, the next day." [444]

On further cross-examination he was shown a picture which he said looked like Vanzetti [444]. Asked if that was not the man he had seen he said he did not know and then:

"He looks so much like the man you can't say whether he is or not?—I wouldn't say." [445]

Faulkner's characterization of the car was contradicted by the conductor of the train, McNAUGHT, [1277] and by Brooks, the ticket agent at East Braintree [1305], as well as by a letter from the Railroad Company [1350]. The smoker on this train was a car of full length and not a combination car.

Brooks testified that on several occasions months after April 15th he, too, had seen a tall, dark man with a black bag get off at East Braintree [1300–1302]. He had seen only one such man, and this was not Vanzetti. [1305]

The conductor said that no cash fares good from Plymouth or neighboring stations to East Braintree, South Braintree, or Braintree had been taken up on the train on which Faulkner rode that morning. He had no record of tickets or mileage books; those were turned in to the railroad company which kept a record [1277–1282]. The ticket agents at Plymouth, Seaside and Kingston (stations immediately after Plymouth) testified that on April 15th no tickets had been purchased for any of these destinations, but some had been sold for Boston at Plymouth and at Seaside. All of the ticket agents said they had not seen Vanzetti at their stations on April 15th. [1283–1297]

2. HARRY E. DOLBEARE, a piano repairer, was one of the prospective jurors at the trial. On seeing Vanzetti in court he identified him as one of the men he had seen between ten o'clock and noon on the day of the crime in the back of a car with a number of other foreigners, near South Braintree Square [489, 490]:

"Will you describe him to the jury? Describe what he looked like, the man that you saw there.—He looked like a foreigner, and he had a very heavy mustache, quite dark. The position do you want?

Yes, anything you noticed about him.—As the car came along towards me, this party that attracted my attention particularly was leaning forward

as though he was talking to either the driver or the other person in front of the car.

Now, have you seen that man since?—Yes, sir.

Where did you see him or where have you seen him since that time?—In this court room.

You, as I understand, were summoned as one of the veniremen in this case?—I was.

What day was that?—Thursday, June 2.

Where were you in the court room?—I was sitting on the front seat of the benches about halfway along.

Did you at that time see the man that you saw in South Braintree that day?—I did.

Where did you see that man?—In the dock. . . .

Did you recognize him when you saw him in the court room that day?—I did. I had the same view of him that day in the court room as I had in the car, a profile view.

Is there any doubt in your mind he is the man you saw that day in South Braintree?—Not a particle. [490] . . .

When did you learn of the shooting?—In the afternoon.

Did you subsequently see any pictures published of the men arrested?—I did.

From the time that you knew of the shooting until you were called to serve as a jurymen in this case, had you told anybody of your identification?—I had.

To whom had you told it?" [491]

The last question was objected to by the defense and not urged by the prosecution so that the question was not answered. No attempt was made on cross-examination to ascertain the reason for Dolbeare's not having come forward as a witness.

Mr. McAnarney cross-examined him about the exact time he had seen the car, attempting to get an admission that it was before ten o'clock. The Court excluded the question in the form in which it was put and counsel did not ask it in the form suggested by the Judge [492]. He was then asked about what attracted his attention to the car:

"Then there was nothing to attract your attention to this man until the car was about directly opposite you?—Yes, there was.

What was it?—The appearance of the whole five attracted my attention.

The appearance of the whole five. How did the whole five appear?—They appeared strange to me, as strangers to the town, as a carload of foreigners.

You saw a car that contained men who appeared to be strangers to you, and they appeared to be foreigners?—They did.

What is that?—They did.

What else?—They appeared to be foreigners.

What else?—I hardly know how to express myself. I know how I felt

at the time. I felt it was a tough looking bunch, that is the very feeling that came to my mind at the time.

A tough looking bunch?—That carload was a tough looking bunch, if you will excuse my language. [495] . . .

Have you now any recollection of how the other men appeared?—Well, I wouldn't want to be put on record, because my impression is not formed enough to be sure.

Well, Mister, you are now testifying here in court, and I want you to say the whole truth, tell everything you saw?—That is just what I told Mr. Moore I would do when he was out to my house, the whole truth and nothing but the truth.

That is what we want. And now I want from you the very best description you can give of those two men on that front seat?—I told you those two men on the front seat didn't impress me as much as the man on the back seat, not enough to make an impression.

How much did they impress you?—Hardly anything.

Have you anything of their faces or clothes now in your mind?—No. [496] . . .

You wouldn't say whether those men had jumpers or overalls on, or not?—No, sir.

Were their faces clean or dirty and grimy?—I couldn't say.

Do you mean to include those two men, those two men on that front seat as part of a tough looking bunch?—I do.

Have you anything in your mind by which you characterize those men as tough, other than you have now given us?—I have not.

You haven't told me, Mister, how the men on that back seat were dressed. Can you tell us now whether they had on overalls, or not?—I cannot.

Were they smooth face? Did they have heards? I am asking too many questions. Were they smooth faced?—I don't know.

Did they have mustaches?—I don't know.

Did they have hats or caps?—I don't know.

Well, then, is there anything of those four men, other than what you have given, by which you characterize them as a tough looking bunch? Is there anything other than what you have now given? Is there?—No." [497]

3. MICHAEL LEVANGIE, gate tender of the New York, New Haven & Hartford Railroad at the Pearl Street crossing near the South Braintree station, testified that he had heard shots and looked east, in the direction from which the noise had come:

"Now, what did you see as you looked east?—I saw one man coming behind a pile of bricks, walking quite fast, and shooting as he went across the road." [414]

Levangie had at that point heard the bell for an approaching train, and had put down his gates:

"Then what happened next?—I looked around, to see if it was coming quick, and the first thing I saw an automobile coming up.

Where did you see the automobile coming?—Right up the hill.

Now, go ahead and tell us everything that happened from that point on.—It came right up the hill as far as the gate. Of course, I had my gates down, and the first thing I knew, there was a revolver pointed like that at my head. I looked back at the train to see if I had a chance enough to let them go. I saw there was chance to let them go, and I let them, and I put my gates back again where they belonged.” [415]

He said he had not seen who held the gun, which was a shiny revolver; he also stated that the car was dark, full of dust, and going eighteen to twenty miles an hour. [416] He did not know how many men had been in the car, but said he had seen the driver at a distance of twelve feet. He described the man:

“Dark complected man, with cheek bones sticking out, black hair, heavy brown mustache, slouch hat, and army coat.” [417]

Levangie had seen this man since, in the Brockton police station, according to his testimony. He identified Vanzetti as the man:

“We will assume it was after they got him, but how long after the shooting?—It was some time in May, if I am not mistaken.

Whereabouts in the Brockton police station did you see him?—I don’t know whereabouts. It was in a room they had him there.

Are you sure he is the man you saw that day, Mr. Levangie?—Yes, sir.” [418]

On cross-examination by Mr. McAnarney:

“About two weeks ago, one afternoon I was up at your crossing, wasn’t I? You talked with me two or three weeks ago, didn’t you?—I believe I did.

What is that?—I think I did.

You know you did, don’t you? Any doubt about that? Come, any doubt about that, Mr. Levangie?—I don’t know.

You don’t know whether you are in doubt about it, or not? I didn’t have any revolver, did I,—nothing shiny in my hand?—No, no.

Was I there talking to you?—Possibly you was.

Possibly? Is that as strong as you can go on that? Mr. Levangie, [421] was I talking to you up to your gates there two or three weeks ago?—I don’t remember; I see so many I can’t tell.

Was I talking to you twice right on the same afternoon, and Mr. Sullivan was there?—I don’t know that. . . .

Can’t you remember talking to Mr. Sullivan as I stepped up to you?—No, sir.

Can’t you remembering talking to me again, telling me that my brother had acted for you in a case?—I don’t remember that.

Well, I will ask you this question: Do you remember telling me that the front and every curtain on the left hand side of that car was so that you could not see into the car?—I don’t remember that.

Do you remember telling me that all the view you got of the man in the

car was when the car was coming towards you, and you looked through the windshield, and could not see as he went by you on account of the curtains? Didn't you so tell me, Mr. Witness?—I don't remember." [422] . . .

(By Mr. McAnarney) "Mr. Levangie, when you said that you have no recollection of me talking to you at all, is it because you don't remember my face, my name, or my personality, or what is it?—I don't remember anything about it whatever.

So that you stand, in the light of all your senses, to-day your position is that I never spoke to you there at the gate house, whether it is two, three or four weeks ago?—I don't know. . . .

(By Mr. Moore) Mr. Levangie, have you at any time or any place or to any person described the man, and the only man, that you saw or claim to have seen in that car as a light complected, Swedish or Norwegian type of person?—No, sir. The man that I saw was dark complected.

You say positively and flatly that at no time, at no place, and to no person have you ever described the man, and the only man, that you saw in that car as a light complected, light haired person?—No, sir." [424]

In contradiction of Levangie the defense produced the following four witnesses: VICTORSON, freight clerk for the railroad, who had heard Levangie say a few minutes after the shooting that it would be hard to identify the man he had seen [1371, 1372]; MCCARTHY, a locomotive fireman to whom Levangie had said immediately after it that he would know the men again if he saw them [2000]; CARTER, an employee of Slater & Morell, who had been told by Levangie at about 4:30 on the day of the crime that the driver was a light-haired man [965]; and SULLIVAN, Levangie's associate gatekeeper, who testified he had seen McAnarney talking with Levangie a short time before the trial [1076]. Before the Lowell Committee COLLINS, reporter for the *Boston Globe*, testified that Levangie had told him right after the shooting that he had seen no one. [5005]

4. AUSTIN T. REED, the gate-tender at the Matfield crossing, said he had seen a car coming from West Bridgewater at about 4:15 P. M. just as he was letting down the gates for an approaching train:

"What did you observe about that automobile? Tell us from what direction it was coming and how it was coming?—It was coming from West Bridgewater and coming at a pretty fast rate of speed and so fast that it kicked up the dust and made me think it was coming pretty fast.

What happened as you stood there with your sign at the side of the track?—Why, I had to walk across the track onto the west side and as I saw this automobile wasn't going to stop, it didn't have time enough to get by ahead of the train. I had my sign in my hand, and as they approached they did not seem to want to stop then.

Yes.—And one of them in the automobile asked me, 'What to hell I was

holding him up for?' He pointed his finger at me, and they were talking amongst themselves, and seemed quite anxious to get by.

Where were you when that man spoke to you?—I was on the west side of the track, in the middle of the road.

Where was the automobile then?—Up the street about 40 feet away from there.

Was the automobile stopped, or was it in motion at that time?—It was, —the engine was running, but it had come to a stop." [595]

Reed testified that the man who had spoken had been sitting next the driver. What occurred after the passage of the train he described as follows:

"This automobile came by, and they swung up aside of the shanty, and he pointed his finger at me again.

Who?—And he says, 'What to hell did you hold us up for?' And they beat it down the street and went down Matfield Street.

Was it the same man who had spoken to you before, or a different man? —This is the same man.

How near was he to you when he made that second remark to you by your shanty?—Within about four feet of the doorway.

Was the machine standing still or was it moving?—It was moving." [596]

The car he said, came back after a few minutes, recrossed the tracks and disappeared going fast in the direction of West Bridgewater.

The witness was then asked to describe the man who had spoken to him:

"Will you describe the appearance, the personal appearance of that man who spoke to you those two times?—He was a dark complected man, kind of hollow cheeks, with high cheek bones, had a stubbed mustache. And kind of a stubbed mustache, bushy. His hair was black.

Do you remember how he was dressed?—He had a slouch hat on, dark, dark slouch hat, and a dark suit.

Have you ever seen that man since that day?—Yes, sir.

Where did you see him after that time?—Brockton police station.

When did you see him there?—About three weeks after he was arrested. . . .

Are you sure he is the man you saw that day at Matfield?—Yes.

Any doubt in your mind?—No, sir.

Did you notice the driver of the car?—What I noticed of the driver was that he was a kind of a thin-built man. He was squatted down in behind the steering gear so you could not see very much of him. He was a small man, appeared to be.

Can you tell us how large a car this was?—Five-passenger car." [597]

Reed said he had seen the car again at Plymouth "at the trial." He said he had heard about the shooting a couple of nights after the events just recounted. [598]

On cross-examination by Mr. McAnarney he stated that the automobile had come up and stopped about forty feet away from the tracks, and that it had been raising quite a cloud of dust before then, but that he did not know whether there had been dust upon its body [599]. The man he saw had worn a dark colored suit, but he did not know whether or not there had been dust on that. He had noticed no dust on the man's face. He said he had worn a soft hat:

"So that so far as you now have in mind in answering these questions as to the picture you saw that day at Matfield, neither the clothes of the man or face of the man or the hat that he wore appeared to you to be dusty. That is true, isn't it?—Yes, sir.

Neither have you now any recollection that it was a dusty car?—No, sir." [601]

He said there were four other men in the car, but he could not describe any of them, nor could he say whether the side curtains were up or down. [605]

The first time Reed had seen any one he could identify as the man in the automobile, he said, had been in Brockton in May at the police station, to which he had gone alone:

"Had any one spoken to you about this matter before?—No, sir.

So that no one knew that you were coming to the Brockton police station?—No, sir.

You thought you would do a little detective work of your own. Is that right?— [Witness hesitates.]

That is right, isn't it?—[Witness hesitates.] Yes.

Yes. Well, did you introduce yourself when you went into, when you got to the police station and told them who you were and what you wanted?—Not at first.

Well, what did you do first?—Why, I asked to see the two defendants that were there. [606] . . .

So that when you went up there, you wanted,—and the picture in your mind you wanted to find was the face of some Italian man?—The face I wanted to see was the face of the one I had seen.

Would you kindly answer my question, please. It was the face of an Italian, wasn't it?—Yes, sir.

And the two men brought in to you were Italians, weren't they?—Yes, sir.

What did the other man look like? What did the other man look like?—He was a medium height man, medium build, round face, medium color hair, brown.

Medium colored, brown hair. Well, now, did they tell you who that man was, that other man? Were you given to understand who he was?—No, sir.

Didn't you understand that he was Sacco?—No, sir.

Did they give you any understanding as to who he was?—No, sir.

You saw they were Italians, both of them?—Yes.

You judged that from their appearance?—Yes, sir.

Did these two men converse together anytime, the two men who were brought in for you to look at?—No, sir.

How long were you in the room with them?—Not over a minute.

Did you leave the room first, or they?—They.

Did the man have his,—did the men have their hats on or bare headed?—Bare headed.

Did they have a hat or cap in their hands?—No.

When next did you see the man you called the defendant?—At Plymouth. [607] . . .

Well, you never asked to see this man Vanzetti with a hat on, did you?—No, sir.

You never asked to see him with a dark hat on, did you?—No, sir.

What kind of clothes did he have on when you saw him at Brockton?—A dark suit.

How was he dressed otherwise?—He had a shirt on that was,—a soft collar attached to it.

A soft collar, dark coat, vest, trousers, no hat?—No, sir.

Did it seem to you like the same suit of clothes you saw on the man at Matfield station?—They looked the same. [608] . . .

Hadn't you seen pictures in the papers the day after the arrest of Vanzetti?—No, sir.

And Sacco. You had not seen them at all?—No, sir.

You saw them when you got to Brockton sometime that day?—I saw them that night, I believe.

I thought you said,—you did see them at the police station?—I did not see any pictures at the police station.

No. Did you see them in Brockton?—No.

Saw them after you got home?—Yes.

Where did you get them?—They were in the papers beforehand.

They were in the papers beforehand? You mean, in that day's paper?—I do not know just what day's paper it was in.

Where were you when you saw that paper?—At home.

Well, you had not seen it before?—No, sir.

So that it is fair to assume that you were at Brockton to identify these men on the day that their photographs came out in the paper. That is correct, isn't it?—I believe their photographs had been in the paper before I went to see them.

Yes, you know they had, don't you?—I didn't see them.

Well, you knew the photographs had been in the paper before you went to Brockton, don't you?—I had not heard about them, seen them.

[609] . . .

Now, explain in any way you want to your answer there. 'They had been in the papers beforehand.' What do you mean by that?—Well, when I came

to see the pictures in that paper, I noticed what date they were in the paper. And from that you?—It was the previous date from the day I was looking at it when I was up to the police court.

So that their pictures were in the daily papers, the day before you went to the Brockton police court, weren't they?—A day or two before.

A day or two before? You were interested in this case, weren't you?—[Witness hesitates.]

You were, weren't you?—Not until after I saw the defendants.

Not until when?—Not until after I had been up to the police station. . . .

It isn't the fact that you saw men in the automobile that made you think they were Italians, is it?—Yes, sir.

Oh. Then it is the fact that you saw men in the automobile is the reason why you say you thought they were Italians, isn't it?—As there being Italians in the automobile and hearing that they had Italians held, I wanted to see them.

You wanted to see them? Then my question and your answer is, that when you went up there from Matfield the men you were looking for were Italians, isn't it, then you went to look for Italians, you expected to find Italians, didn't you?

—[Witness hesitates.]

You did, didn't you?—Yes. [610] . . .

When did you first learn about the shooting? When did you first learn about the shooting, Mr. Reed?—I heard something about it the night before I went up to the police station.

You had not seen a thing about it in the papers?—No, sir.

Had not seen or read a single line about this matter until the night after you went to the police station?—No, sir.

Is that right?—Yes, sir.

Had you talked with anybody down to your home or down to Matfield about this shooting?—No, sir.

So that, well,—then, until you got up to Brockton you did not know anything about it. Is that right?—Why, only what little I had heard.

When did you hear it?—In this store, the night before.

Then you knew about it the night before?—I did not know where it happened." [611]

Reed said that on his way to Brockton in the electric car someone had told him about the crime and where it had happened [612]. He was positive he had not seen photographs of the defendants, but stated that the *Brockton Enterprise* containing their pictures had been in his home before he went to the station. [614]

On recross-examination by Mr. Moore; he was questioned as follows:

"And his salutation to you was in a loud, bold voice, in the English phraseology that you saw fit to give, something I believe to the effect, 'What in hell did you stop us for?'—Yes, sir.

MR. KATZMANN. One minute. [615]

Is that right?

MR. KATZMANN. I object.

THE COURT. You assumed quite a good many things in the question before you got to the conclusion.

Is that what he said to you?

THE COURT. That may stand.—Yes.

THE COURT. The rest may be stricken out.

And the voice was loud and full and strong back forty feet. Is that right? —Yes, sir.

What?—Yes, sir.

With a running motor?—Yes, sir.

And a train passing,—approaching?—Yes, sir.

The quality of the English was unmistakable and clear?—Why,—

Is that right? Answer yes or no. What?—Yes.

When you went to the Brockton police station, did you ask this man that you saw there to speak to you?—No, sir.

Have you ever heard him speak?—Yes, sir.

What?—Yes, sir.

You say you have?—Yes, sir.

Where?—At the Brockton police station.

Brockton—— —Police station.

You mean, that he spoke to you?—No, sir.

And who did he speak to?—The officer that brought him in.

In other words, some one brought him in and he spoke to this officer. Is that what you mean to say, the two of them standing side by side?—One man was brought in ahead, and the other back of him.

And they spoke to them?—The defendants did not speak to each other.

And do you claim that you identified the voice?—Yes, sir.

What did he say in the Brockton police station?—I do not remember what he did say.

You do not remember what he said?—No.

Do you remember whether he said anything or not?—No, sir. He just spoke anyway.

What did he say?—I don't know.

You were there to hear and see, weren't you?—Yes, sir.

You had come all the way from your little home down there to hear and see, had you?—Yes.

That is what you came for, wasn't it?—Yes.

You haven't any recollection of what he said?—No, sir.

Whether it was good morning or good night?—It was not either of those.

'Thank you'?—No, sir. Not that. [616]

What was it?—I couldn't say what it was.

Any idea in the world what he said?—No, sir.

Whether it was 'Good night,' or whether it was a comment on the weather, or what not?—No, sir.

It was a conversational tone?—It was that same gruff tone that he used in speaking to me.” [617]

5. In connection with Vanzetti's presence in the neighborhood of the crime the testimony of AUSTIN C. COLE, conductor of the trolley car on which both defendants were arrested, must be considered. Cole testified to having seen Vanzetti and Sacco on his car during the evening of April 14th or 15th. He marked the dates as being those of the only times when he had been on the run from Bridgewater to Brockton during that period, but was unable to say on which of the two dates, April 14th or 15th, he had seen the men. He said that both had boarded his Brockton-bound car at Sunset Avenue, about a mile and a half from Elm Square in West Bridgewater [732, 733]. On cross-examination he stated that on that occasion he had first thought the man was a friend of his, one Tony [737]. Shown a photograph of one Scavitto, he said, it resembled Vanzetti; but he would not say whether it was a picture of the man who had boarded his car, as the picture was a side view and he had not seen the man that way [738]. The witness was confronted with Tony himself in Court, but Tony gave no testimony.

JOSEPH SCAVITTO, whom counsel happened to notice while he was listening to the trial and whom they picked out for his resemblance to Vanzetti, testified that he had come to the trial because of a slight acquaintance with Sacco. He was specifically asked whether he had been at any of the places at which the various witnesses placed Vanzetti, and said he had not. [1533, 1534]

When VANZETTI was on the stand Mr. Katzmman asked him whether he had been in Brockton in an automobile on April 1st, 1920. He shook his head and then said: “I mean no because I never rode in Brockton in an automobile, in Brockton” [1812]. In rebuttal the prosecution called FRANK W. HAWLEY, a salesman for the Plymouth Rubber Company, who had for about eighteen years been a special police officer and constable. He said he had been turning his own car in a Brockton street on April 1st, 1920, when a seven passenger Buick touring car drove up and had to wait. He said it was a dirty car with a flapping curtain on one side. He said the man next to the driver was Vanzetti [2103]. Hawley had some talk with the driver, but was not asked to describe him, nor was he asked when he had first made his identification of Vanzetti.

6. *Summary.*

All the witnesses against Vanzetti were at the trial positive of their identification, but several people said that earlier Levangie had himself expressed doubt. None of them but Levangie identified immediately upon the arrest although Reed's identification was made a few days after it. Vanzetti was not at once formally charged with participation in the murders, nor was he so charged even at the time of the preliminary hearing against Sacco, held on May 26th, 1920, in spite of the fact that suspicion of

his complicity had before this time been voiced. Mr. Katzmann, before the Lowell Committee, indicated that he had himself been dissatisfied with the identification of Vanzetti at this early period [5078-5080]. What prompted Faulkner to identify in July does not appear. Nor was it ever brought out why Dolbeare did not come forward until impaneled as a prospective juror.

b. Testimony Relating to Sacco

Seven witnesses identified Sacco: Mrs. Andrews, Tracy, Heron, Pelser, Miss Splaine, Miss Devlin and Goodridge.

1. LOLA ANDREWS, a divorced woman occupied as practical nurse, had on the morning of the crime gone with her friend, Mrs. Campbell, to South Braintree to look for work in the shoe factories. She testified that when she arrived at the Slater & Morrill factory at around 11:30 she saw two men near an automobile which was standing there [333, 334]. One of these she described as light and sickly looking, the other as dark and wearing dark clothes. The dark man had been working under the car, she said, and the light man standing near it. She testified that when she came out of the factory about fifteen minutes after having gone in, she asked the dark man who was under the car how to get to the entrance of the Rice & Hutchins factory:

“Did you have any talk with either of those men at that time?—Yes, sir. Which man?—With the man who was fixing the car.

Was he the light man or the dark man?—No, sir, he was the dark man.

Where was he when you had the talk with him?—When I had the talk with him, he was under the car.

Did he get up at any time?—Yes, sir.

I mean, when you had your talk with him, did he get up?—I spoke to him and he got up, as I spoke to him.

And you had some talk with him?—Yes.

Will you tell the jury what talk you had with him?—I asked him if he would please show me how to get into the factory office, that I did not know how to go.

What did he say?—He told me,—he asked me which factory I wanted, the Slater? I said ‘No, sir, the Rice & Hutchins.’ [336]

Anything more?—That is all the conversation.

Did he say anything more?—No.

Did he tell you how to get in?—Yes.

Well, I want you to tell us whatever was said.—He told me how to go to get into the factory.” [337]

Mrs. Andrews said she had seen this man at the Dedham jail and that she saw him now in the courtroom.

“Just point to the man you mean?—That man there [indicating].

Do you mean—

[The defendant Sacco stands up in the cage and says: 'Take a good look. I am myself.'] (He actually said: 'I am the man? Do you mean me? Take a good look.')

Then you mean the man who just stood up and made the remark.—Yes, sir.

The man they call Sacco?—Yes, sir." [337]

The witness said that Mrs. Campbell who had been with her in South Braintree was 69 years old and lived in Maine [338]. Asked about Mrs. Campbell's eyesight, Mrs. Andrews was allowed to testify so as to excuse the non-production of Mrs. Campbell by the Commonwealth. Her testimony was allowed after the following discussion:

"THE COURT. That must be based upon your personal observation and nothing else, not what somebody told you, but what you saw with your own eyes, and your own personal observation. You may answer if you made a personal observation and can answer from such observation. I will save you whatever rights you desire.

MR. JEREMIAH MCANARNEY. For both defendants?

THE COURT. Sure. Because I understand that you are going to claim that the Commonwealth should have produced this witness or taken a deposition of the witness or taken some steps to procure the attendance of the witness at the trial.

MR. WILLIAMS. They can't claim we should have taken a deposition, can they?

THE COURT. You heard what he said. [339]

MR. WILLIAMS. I do not see how we could have taken a deposition.

THE COURT. I am taking counsel for what he says. I will deal with the law question about depositions when the time comes, but not now. It is my duty to state the claim of counsel. You may answer.

THE WITNESS. In regard to Mrs. Campbell's eyesight? I would say that her eyesight was poor.

And do you know what the matter with it is?—It is cataracts on the back of the eyes.

On which eye?—On both of them.

Do you know how long she has been afflicted with cataracts of the eyes?—How long she has been afflicted with them?

THE COURT. From your own personal observation. Not what somebody told you.

On April 15, did she have these cataracts on her eyes?—Yes, sir.

I mean, April 15 of last year.—Of last year, yes, sir." [340]

When cross-examined by Mr. Moore it appeared that the witness had been interviewed by him at her home on January 14th, 1921. Asked by him about the condition of the car she was unable to describe it. She was then questioned as follows:

"On your way down, there was a man at the front of the car working over the hood. Is that your statement?—Yes, sir.

You did not particularly observe him at that time?—No, sir.

At that time you paid no particular attention to him, going down?—Any more than to notice him, that was all.

You did not speak to him nor he to you?—No, sir.

Now, you also stated that there was another man at the rear of the car at that time?—Yes, sir.

And that man was, I believe you described as tall, slender, light complexioned?—Yes, sir.

Light hair. I believe you said looked like a Swede?—Yes, sir. [343] . . .

Now, that is the same time,—you do not claim, as I understand, Mrs. Andrews, that you identified the defendant on your way down; you did not look at him at that time particularly closely at all?—No, sir.

It was on the way back you identified him?—Yes, sir.

Now, are you positive that the man, the light-complexioned man, was at the rear of the car still when you came back?—No, sir, I won't say that I am positive.

Well, are you as positive of that as you are that you identified the defendant when you came back?—You mean that I am as positive that the man was standing at the back of the car as I am that the man was at the front of the car? Is that the way you mean? Yes, sir, I think I am.

Do you remember stating to me:

'Did you see any other men around the car?—Yes. The light man in the back seat.'

—I told you that the light man was in the back seat?

Just a minute. My question is, did you testify or state to me as follows:

'Did you see any other men around the car?—Yes, the light man in the back seat.'

Did you so state to me?—I did, yes, sir.

Well, when was the light man in the back seat?—When I went down to the factory.

Haven't you already told this jury that when you went down the light man was behind the car?—I said the light man was in the seat, in the back seat of the car going in.

When you went down, he was in the back seat of the car?—In the back seat of the car, yes, sir.

Not at the rear of the car?—No, sir." [347]

On further cross-examination it appeared she had been taken to see Sacco in the jail in February, 1921. She claimed to have picked him out there while he was walking up and down by himself in a room, and said she had not been told beforehand to look for him there:

"Well, what did you do next?—I went around the jail.

Why didn't you look at these prisoners?—Because those prisoners there sitting and talking with their friends didn't interest me at all.

You were there to identify somebody?—I wasn't there to identify those people.

You were there to see if Dedham County Jail contained the man you saw on April 15th, isn't that right, that is what you were there for?—Yes, that is what I was there for.

Now, did you look at these one or two prisoners to see if they were the men?—No, I did not.

Why not?—Because I knew they were not the men.

How did you know?—Because I knew they were not.

How did you know? Did somebody tell you?—Nobody told me.

Did you look at them?—I glanced at them as I passed by.

You knew they were not the men you were there to identify?—No, sir.

Who told you,—Broullard?—No, sir.

MR. KATZMANN: One moment.

THE COURT: That assumes somebody did.

Did anybody tell you?—No, sir.

How did you know, then, they were not?—Because they did not resemble the man I had seen.

Then where did you go?—I told you, I went through part of the jail.

What part?—I couldn't tell you.

Who piloted you through?—I don't remember.

Who went with you?—A man went with me.

What was his name?—I couldn't tell you.

Where did he take you?—He took me down through different parts of the jail.

What part?—I would imagine it was a laundry, one part. I don't know what they call the place where they put the prisoners.

Were you told the man was there?—No.

Did you look at the men?—I looked at the men as I passed by.

Didn't look them over carefully at all?—I looked at them as I went by.

And examined them in such detail that you satisfied yourself they were not the men?—The men I saw in their cells I satisfied myself they were not the men. [359] . . .

Did something happen while you were in there?—Yes, sir.

What?—Why this happened, that the room I was in was—I don't know just how to explain it, but it had kind of an opening back here, like there was a room underneath that you could look from the room I am in down into this room underneath.

And you saw what down there?—I saw a man.

All alone?—I won't say that he was all alone.

Well, was he alone, or wasn't he?—I can't remember whether he was alone or not.

Now, Mrs. Andrews, don't you remember that he was all alone?—No, I can't remember that he was all alone.

Now, you stood and watched that man very closely, didn't you?—Why, I looked at him closely, yes, sir.

And you knew what you were there for, didn't you?—I knew I was there to identify a man, if I could. [361]

And you stood and watched this man to your entire satisfaction, as long as you wanted to, didn't you?—Yes, sir.

Probably how long? 10 minutes, 15 minutes?—All of that.

And you can't tell this jury whether there was anyone else in that room at all?—Do you mean in the room with the prisoner?

Yes.—I will say I don't know. I didn't look to see. I was looking at this one man.

Was anybody at your side right at the time?—No, sir, not right at my side.

Was there anybody else in the room with you?—Yes, sir.

Who?—The man who took me in the jail. . . .

How did you select that place to go?—Because I was in that room being shown over the jail.

You walked over there of your own initiative, or your own suggestion?—I walked over there to see what was down there.

Where else did you go in that jail on your own initiative?—I walked all around the room.

Did you go down into the bakery shop alone?—No, sir, I did not.

Piloted down there?—Yes, sir.

Did you go to the laundry alone?—I did not.

Piloted in there, is that right?—Yes, sir.

Did you go over into the shoe factory?—Yes, sir.

Piloted over there, is that right?—Yes, sir. [362] . . .

You walked across a big room, like this, from the desk over to the rail on the far side, didn't you?—I walked over to this grating from where I was standing.

Alone?—Yes, sir.

And that is the only place in that jail that you went alone and on your own initiative?—Yes, sir.

And that is the place that you say you found the man that you saw on April 15th?—Yes, sir.

And he was down there alone,—no one else in the room?—I am not saying that he was alone, Mr. Moore. [363] . . .

What kind of a shirt did he have on? He didn't have any coat on the day you saw him in the jail?—No, sir.

What kind of a shirt did he have on?—I won't say what kind of a shirt he had on.

What colored shirt?—I don't remember what color it was.

What colored trousers did he have on?—I don't know.

Do you mean to tell this jury that your recollection of the clothing that man was wearing in the county jail here on the date you saw him in February of this year is not as clear, when you were there for the specific purpose of making an identification, was not as clear as is your recollection of it that date in April of 1920, a year and a half ago? Is that what you

mean to tell this jury?—I mean, I was not there to look at his clothing. I was to look at his face. [364] . . .

Did he sit down?—No, sir.

Did he turn and look at you?—I don't know whether he turned and looked at me personally, or not. He looked up, as though he was looking at me.

And you stood and looked at each other?—Why, I looked at him, and he turned and walked back again.

Now, Mrs. Andrews, would you want to state that the facts are that the only time you saw this man was when he was trying to get some exercise playing hand ball down there, or playing ball with a medicine ball down there?—Why, I didn't see any ball there at all.

You didn't see him running around?—Certainly not.

But, you go over there, and that is the only place in the Dedham County Jail that you went of your own volition and on your own initiative, that is right?—Yes, sir. [366] . . .

In your statement to me on the date that I talked with you, I stood up in front of you and you stood in front of me, and I asked you, just as I now ask you, if the man you saw on April 15th was as large a man as I, and you stated he was at that time, did you not.—I told you I thought he was about your height, at that time.

And you are still of the same impression, are you not?—I am not saying I really knew it; I said that I thought he was.

You were as close to that man that April 15th as you are now to me in front of this jury?—Yes sir.

Five or six feet?—Yes, sir.

And your observation and impression would be then and at the time I talked with you and now that he was as large a man in height as am I?—Yes, sir." [367]

On the following day Mr. McAnarney cross-examined Mrs. Andrews. She said that when she reached the room in the jail in which she saw Sacco she had not been told to go anywhere, and that she had just walked around [404]:

"Very well. Now, you looked down and you saw the sun shine. You did not stop to see any one there at all, did you?—Why, no, sir.

But you happened to observe the sunshine and some one, did you?—Yes.

That person happened to be the man you think looks like this man?—It happened to be the man I am looking at now.

Yes. The man you are looking at now?—Yes.

And you say now that that was all simply a coincidence, meaning that you weren't told to go this place to look, that you weren't told to look at any person, and that you did not know that there was a person there when you went over there to look. Is that right?—I was told in this way—

What is that?—I don't understand that that way, Mr. McAnarney.

I am directing your attention now to your happening to go, as you said

over to this place where you looked through and saw the sunshine.—I think the man went and directed my attention to the building there.

You weren't told to go there, were you?—No, sir, I wasn't told to go to that grating at all.

You simply happened to go to the grating by accident?—Yes." [405]

At the interview with Mr. Moore before the trial Mrs. Andrews had been shown a number of photographs. She was cross-examined at length by him about this interview and showed unwillingness to admit that the photographs shown her at the trial were the ones he had previously shown her. The record of this examination is so confused that it is difficult for the reader to determine just which pictures she had really previously seen:

"Do you remember my questioning you as follows:

'I show you a group of photographs marked 12-22 and ask you if you have even seen any of the men whose photographs appear there at any time or place, particularly on April 15th, 1920, at South Braintree?'

And you answering:

'The only man that looks like him at all is this man.'

Do you remember so stating?—Yes, sir.

'This man with the straw hat on, and a cigar in his hand?—Yes.'

Do you remember my so questioning you?—I remember you asking me that question, yes, sir.

Is that the list of photographs marked 12-22 that was shown to you at that time [indicating]?—I can't say as they are.

Can you say that they are not?—I will say that they are not.

Based upon what?—That I don't see the picture there that I saw at that time. [349] . . .

Do you recognize—Look these pictures over—'12-22'—and state whether or not you recognize any picture in there as a picture of any person that you have ever seen heretofore.—I don't recognize these pictures at all, for I don't ever remember of seeing these before.

But you do remember that a large number of photographs was shown to you?—You showed me some photographs.

Some thirty or forty in number?—I don't know.

That would be your best recollection?—I don't know.

Mrs. Andrews, do you recognize any photograph there as being any one of the photographs that were shown to you on the date that I talked with you?—I don't recognize any of those photographs at all. [352] . . .

Do you remember being asked this question: I called your attention to the group of photographs marked '22-36-C, and asked you if you have ever seen any of those men.'—Answer: 'I have never seen any of those men at all. The color of that man's hair and the face and the complexion looks like him.' Do you remember so stating?—I don't remember so stating that answer to you in that way.

Question: 'But a larger man?' Answer: 'Yes.' Did you so state?—I did not, no, sir.

Question: 'An older man than he is?'—Answer: 'I don't know whether this man is 28 or 38.' Did you so state?—Yes, sir, I did say that.

Question: 'But you would not by any means pretend to say that this is the man?'—Answer: 'No.' Did you so state?—I did not make that answer.

Question: 'Would you say positively that it is not the man?'—Answer: 'That man there is not the man.' Did you so state?—I said the man—

Answer my question, please. Did you so state?—I don't remember.

Will you say you did not?—I will say that I don't remember.

Question: 'You are positive?'—Answer: 'Yes.' Did you so state?—I don't remember.

THE COURT. What is she speaking about? I don't know as the jury knows.

MR. MOORE. I am reading this, your Honor, in order to get to the picture, to which this is preliminary evidence. I have already asked with reference to a group of pictures.

THE COURT. That she says she has never seen.

MR. MOORE. Yes.

Question: 'Positive that is not the man?'—Answer: 'Yes.' Did you so state?—I did not.

Question: 'You mean the man with the soft collar, standing, holding in his hand a derby hat is not the man you saw on April 15, 1920, in South Braintree?'—Answer: 'No, indeed.' Did you so state?—I did not.

Now, directing your attention to this list of pictures that I have just been referring to, '23-36-C.' Now, running those over you find that [354] there is only one man in that picture with a derby hat in his hand, don't you?—Yes, sir.

Who is that the picture of now do you know?—It is the same picture that I pointed out to you at that time.

Absolutely, isn't it?—Yes, sir.

And at that time you answered me in this wise: Question: 'You mean the man with the soft collar, standing, and holding in his hand a derby hat is not the man you saw on April 15, 1920 in South Braintree?'—Answer: 'No, indeed.' Didn't you so answer?—I didn't answer you that way.

My question was as I read it, wasn't it? I asked you that question did I not?—Yes, sir.

You answered me in that wise, did you not?—I did not answer you the way—

How did you answer me?—I told you that he resembled the man I saw at South Braintree. [355] . . .

Referring back to the photographs. Question: 'Would you say that the man had a fuller or more slender face?'—Answer: 'I don't know. He had a funny face.' Did you so state?—Yes, I did.

Question: 'Meaning by that a face that was not a kindly face, a kind of brutal face?'—Answer: 'He did not have a real good looking face.' Did you so state.—I did.

'Did he smile at you?'—Answer: 'No.' Question: 'Did he look cross

and cranky?' Answer: 'He did not seem to like it that I disturbed him.'—Yes, sir.

Question: 'And you say the man standing up with a derby hat in his hand is positively not the man you saw?'—Answer: 'No, he is not. None of the men here are.' Did you so state?—No, sir. [356] . . .

I say, did I show you a photograph on the date that I talked with you that you are now prepared to tell the jury was the photograph of the man you saw on April 15th?—Yes.

And did you tell me on that date that any photograph that I showed to you was the photograph of the man that you saw on April 15th.—I did not, no, sir.

What?—I did not tell you.

You didn't tell me?—No, sir.

On the contrary, you did say that it was not the photograph, did you not?—I did not." [357] . . .

She was also questioned on this subject on the following day by Mr. McAnarney:

"Then, you saw a picture in the group that he showed you, or in the three groups that you saw, what about it?—I say, there was a picture in a group of pictures that he showed me that I do not recognize here among these.

Did you call Mr. Moore's attention to that picture, the one you say that you do not see here? Did you call that picture to Mr. Moore's [408] attention?—Well, in this way: I called his attention to it that, like I would be pointing to that [indicating], I said, 'Well, this man here resembles the man I saw more than any.'" [409] . . .

Her examination was interrupted by her collapse on the stand when she was being particularly pressed concerning these photographs:

". . . Have any of those photographs been shown to you before?—No, sir, I don't think they have.

I call your attention to this question—54 of the record, Mr. Katzmann, of the evidence in this court. 'Do you recognize the picture that is here in the folder marked "23-36-C."?' 'Do you recognize the picture here in this folder marked "23-36-C," do you recognize that as one of the pictures that I showed you on the date that I talked with you?' Answer: 'I recognize a picture that you show me.' Which one of those pictures did you recognize as the one he had showed you?—I think, if any, it would be that one [indicating].

What one? [The witness indicates.]

Is that what you said, 'If anyone, it would be that one?' Was that the photograph that you showed to Mr. Moore?—Yes.

Didn't you say something about having a hat on and a cigar?—No, sir. I am positive I did not.

I call your attention to this question—

MR. KATZMAN, May I have that photograph marked now?

MR. McANARNEY. Shall I put an 'X' on it?

MR. KATZMAN. Well, two.

MR. McANARNEY. A double X.

MR. KATZMAN. Two X's.

MR. WILLIAMS. I think the witness better be allowed to sit down.

THE WITNESS. I feel faint.

MR. KATZMAN. She feels faint.

THE COURT. I think she should have a rest.

MR. McANARNEY. I would rather she have a rest before I examine her further. I will suspend the examination, so that she may have a rest.

[The witness collapses, and is removed from the court room.]” [412]

Mrs. Andrews' collapse, it was later suggested, might have been due to the appearance in the courtroom of a man whom she associated with an attack she claimed had been made on her in February, 1921 [1383]; but she, herself, claimed it was due to her having been grilled about her past life [1383, 3898, 3934].

The defendants sought to contradict Mrs. Andrews by a number of witnesses. Her friend and companion, Mrs. JULIA CAMPBELL, testified that neither of them had spoken to the man underneath the car and that he had never looked up [1309, 10].

“When you got down to Slater & Morrill's factory, before you went in, did you see anything or any person outside?—We saw a car there, and we saw a man in khaki clothes.

You saw a car and a man in khaki clothes?—Yes.

Where was the man?—The man standing——

Yes.—He was standing just on the face of the building now, where there is a cement building there. [1308] . . .

How near was he to that concrete—— —Well, very near it. I couldn't say just exactly, but very near it. That is the man we asked. . . .

Did you see any man doing anything to the automobile?—There was a man down underneath the automobile. He never looked up at all.

Did you or Mrs. Andrews speak to that man who was down under the automobile?—We did not.” [1309]

On cross-examination by Mr. Katzmman she was asked:

“Which way was the automobile facing, Mrs. Campbell?—It was facing down from the track.

Back to the track?—Yes, back to the track.

Have you said it was facing towards the track?—No, sir, I have not. I told the same story, dear man, everytime, and I don't want to get into this trouble.

I don't want you to.—Just as true as you live. It ain't my good will I am here.

That is all right. You and I are friends, are we? So far, I mean?—Yes,

Then he was five feet nearer to Slater & Morrill's than the automobile, wasn't he?—Yes, sir.

Are you tired?

MR. KATZMANN. I think this lady ought not to stand up. She is tired.

[The witness cries, and an officer brings a glass of water.]

THE WITNESS. I don't want nothing.

MR. KATZMANN. I don't think you ought to stand.

THE COURT. Perhaps you better suspend with the witness and call some other.

THE WITNESS. I think it is awful.

MR. KATZMANN. If your Honor please, I don't want to interrogate this witness standing up. I think it is too much of a strain. [1315]

MR. JEREMIAH McANARNEY. I would like to proceed if I could. She is anxious to get home to Maine.

THE COURT. That may be, but I think you should suspend now. You may be excused for a little while, and then perhaps you may return again.

MR. JEREMIAH McANARNEY. I will get a short witness, Mrs. Campbell, you may step down for a minute.

THE COURT. She is advanced in years, and if anything should happen we would feel we kept her on the stand too long. I should feel so, anyway. It is 10 minutes past four. You may take a recess of five minutes.

[Short recess.]

Now, Mrs. Campbell, I want you to do me a favor. If you feel tired, I hate to distress you. Did I bother you?—Yes, I am all right.

Won't you tell me right off? I would be grateful to you if you would. I do not want to tire you. Would you like some water?—I don't care for anything.

You feel comfortable, do you?—Yes, sir.

All right. Now, didn't you in your mind connect the man who was under the car with the man who was standing five feet away from it?—No, I did not. [1316] . . .

Do you say, Mrs. Campbell, that there was no conversation on your coming out of Slater & Morrill's with the man under the car?—There was not.

And do you say also there was no conversation with the man dressed in khaki clothes when you came out?—There was not. We never spoke to either one.

You are positive of that?—I am positively sure. We simply walked out by them and walked into Rice & Hutchins." [1327]

She said she had never talked about the matter until Mr. Reed came to see her. When that was she did not know, but thought it had been a short time before a Massachusetts state officer came with the Maine sheriff to interview her. She was asked where she had been on July 22d, 1920, and on various other dates, but could not say.

"Were you on the street last Tuesday?—Last Tuesday?

Yes.—I was in the washtub last Tuesday.

When you got through with that, did you go out?—No, I had all I could do to home. [1328]

How about the week before that?—Oh, chestnuts!

You don't really mean that, do you?—Well——

I am conducting this examination respectfully to you, am I not?—Well, excuse me, but I can't go back on such things as that.

Do you not consider I am conducting this examination respectfully to you?—Yes, sir, you are all right. You are all right.

Where were you two weeks ago today?—I can't tell you. I guess in my home, because I never go out." [1329]

Mr. Katzmann also asked her about the resemblance of the defendants to the man under the car:

"Do you say either of the defendants in this cage is not the man who was under the automobile?—I do not think I ever saw them men in the world.

Do you say either of the defendants in this cage is not the man who was under the automobile?—Well, I should say they were not men I ever saw.

You haven't any interest in this case, have you?—Not a thing. Not a thing.

And you are able to tell this jury, are you, a man who was down under the side of the automobile and you went behind him; could not see his face?—No. His cap was drawn down, and he never looked up.

Never looked up?—Never looked up.

He had his head down?—Yes, his head hung down.

And you tell this jury that neither of those defendants is that man?—I should say they were not the man.

You did not see his face?—Well, that is all I did see.

You did not see his face, did you?—No, his head was right down there, and I say how they don't look like, anything like that man.

Have you seen the back of the head of the defendant Sacco?—No, I didn't, no.

That is all you saw of this man, wasn't it?—Yes, just what I said.

Have you compared the back of Sacco, the defendant Sacco's head, with the back of the man you saw down?—No.

How do you know he is not the man?—Well, I don't know that he is not the man, but he don't look like the man I saw there. [1331] . . .

Did you look at his face?—Just took a glance and walked right along.

Did you look at his face?—We just simply glanced. [1332]

Not what 'we' did. Did you look at his —— —I simply looked, just by looking, and we saw the cap down over his eyes.

Did you look at his face?—Just what I told you.

Did you look at his face? THE COURT. You better answer that and we will be through with you quicker.

—I just simply looked like that, and like that.

THE COURT. Just take the stand, please, Mrs. Campbell.

[The witness returns to the witness stand.]

THE COURT. Now, just answer his questions and I know he will be through with you.

Did you look at his face?—Just looked up, yes.

Did you look at his face?

THE COURT. Just answer that by yes or no, if you can.—Well, yes, I will say I looked, just looked up at his face.

Could you see it?—I saw the side of his face, yes.

Did you tell the jury a minute ago you never paid any attention to him and didn't look at him?—I just been looking and saw——

Did you tell the jury, Madam, you did not pay any attention to him when you went by?—I didn't pay no attention, just simply walked by.

And didn't look at him, did you?—Just simply looked, saw the man there and saw him with a cap on.

And saw the back of his head? And saw the back of his head?—Well, I saw the side of his cheek, too.

Which cheek?—I can't tell you just exactly.

I have you looked at either cheek of Mr. Sacco from behind?—He don't look like the man I saw.

Oh, I understand that, but did you look at either cheek of Mr. Sacco?—Yes, I looked at him, but he don't look like the man I seen there.

Neither cheek?—No.

And the back of his head doesn't, is that right?—He don't look like the person I saw.

I want to know how much you saw of him.—I didn't see very much of him." [1333]

A Quincy policeman, GEORGE W. FAY, [1375] testified that on the day after the alleged attack in February, 1921, when questioned regarding the possibility that the man who had attacked her might be one of the men she had seen at South Braintree, Mrs. Andrews had said that she had not seen the faces of the men at South Braintree.

ALFRED N. LABRECQUE, insurance agent, newspaper reporter and secretary of the Quincy Chamber of Commerce, testified to the same effect. [1377]

HARRY KURLANSKY, a tailor, whose place of business was near the residence of Mrs. Andrews in Quincy, testified that on the evening she had come back from looking at Sacco in jail, she had told him the Government wanted her to recognize the men but that she could not do so. Kurlansky volunteered as a witness after reading her testimony.

"Now, tell us what was said.—As I sat on my door step and as I know her I always spoke to her when she went by. I said to her, 'Hello, Lola,' and she stopped and she answered me. While she answered me I said, 'You look kind of tired.' She says, 'Yes.' She says, 'They bothering the life out of me.' I says, 'What?' She says, 'I just come from jail.' I says, 'What have you done in jail?' She says, 'The Government took me down and want me to recognize those men,' she says, 'and I don't know a thing about them. I have

Then she is an enemy of yours, isn't she?—Well,—

MR. CALLAHAN. Wait a minute.

THE COURT. Is she?

Is she an enemy of yours?—No, not that she is an enemy.

Is she an enemy of yours?—If you call it so, why—

I am asking you if you call it so?—I don't know, I am sure, about enemy.

Are you an enemy of hers?—I might be.

Are you?—I don't know.

Well, think it over a little longer.—I probably am because I—

I don't want probabilities. Are you an enemy of hers?—Well, yes." [1603]

In rebuttal, the prosecution called a MRS. GAINES to show that Mrs. Andrews' testimony was not of recent contrivance. Mrs. Gaines testified that, about a week after the shooting, Mrs. Andrews had said in Mrs. Campbell's presence that she had tapped the shoulder of the man beneath the car and that he had gotten up and directed her:

"She said she was going to the shoe shop and there was an automobile in front of the shoe shop. I do not know whereabouts. It was there.

Just what she said.—Yes. And she walks over and she asked, she seen this man underneath the automobile, and she taps this man on the shoulder and asks him to please direct her to the Rice & Hutchins shoe shop and he got up and directed her to it.

Is that all she said?—That is all, yes, sir. [2086]

Are you quite sure that was all she said about being in South Braintree?—Yes, sir, that is all I heard in the room, as I was sitting there. . . .

Where was Mrs. Campbell when Mrs. Andrews made that statement?—She was sitting right in the room there, right near us. She never said a word, never answered." [2087]

The witness was cross-examined by Mr. Anarney about the extent of her acquaintance with Mrs. Andrews:

"Did you go into Mrs. Andrews' room that night?—No, sir, I did not.

Have you ever been in her room?—Well, sometimes I did go in; very seldom, though.

When were you there last?—I was there last, I don't know just exactly what day I was in there. I can't remember.

Well, just about when? Try and think a little.—Because she is never home. I very seldom go there. I never go there.

When you were there last, when was that, when were you there last?—At the building?

No. At her room?—I don't remember.

Can't you tell us sometime when you were at her building, her room, I mean? You said you had been there.—I been just at the door to call for her, but I never was in her room.

Then you were never in her room?—No.

When were you last at her door when you called for her?—I don't re-

member just the day.

Never mind the day, but what month was it?—I don't know.

What year was it?—Sometime this year, but I don't know just the day or the date.

I see. Then sometime this year?—Yes.

About when this year was it you called for her?—I don't remember.

Perhaps it would help us. What did you call for her for? Do you remember that?—I don't know.

What is that?—I don't remember what I called her for.

You came to her door?—Yes.

You remember you did not go in?—No, I did not go in.

You rapped on the door, did you?—Yes.

And was she in?—Yes, sir, she was in.

Was she alone?—I don't know. She came to the door alone. I did not see nobody there present.

Don't you know what you wanted? You went upstairs into that corridor, to her room, rapped on the door, she came to the door, and you don't know what month it was and what you called for?—No, sir, I do not, no.

When were you there last before that time?—I never was in Mrs. Andrews' room. I was at the building, but I never was in there.

I ask you when, if you went, when you were there last at that room, before that time?—No, sir, I wasn't.

Were you ever there before?—I don't think so.

Now, you just think a minute. Haven't you been in that room sometime?—I don't remember.

You don't remember?—No, sir. [2088]

Were you ever at that door before?—I probably was, to call her, to ask her something. That is all.

Can you tell us anything you called there to ask her for?—No, sir, I don't." [2089]

After the trial Mr. Moore obtained from Mrs. Andrews a retraction which formed the basis of the fourth supplemental motion filed on September 11th, 1922.¹

Mrs. Andrews had a nineteen year old son who lived in Maine. One of the workers for the defense made his acquaintance and in the summer of 1922 induced him to come to Boston. It was stated and not denied that Mrs. Moore had some hand in getting him to come. Once in Boston he was asked to communicate with his mother and to have her meet him in a room at the Hotel Essex. She, fearful, as she later said, that he was in some trouble, went to the hotel in the evening. There she found her son with two men unknown to her, Fred G. Biedenkapp and John Van Vaerenwyck, both in some way associated with Moore and the defense. She was told that Moore had investigated her past life but that if she could honestly say she had truthfully testified at the trial they would let the matter drop. Ac-

¹ See pp. 116, 117, for discussion of Judge Thayer's decision denying this motion.

cording to an affidavit made by Biedenkapp she then "hung her head and did not answer and tears welled up from her eyes." She finally admitted, however, that she had told Stewart, the Chief of Police, she could not identify Sacco and said she was "a victim of circumstances." She inquired what Moore had "on her"; so an appointment with him was arranged for later that night. All four persons, after having had something to eat, went to Moore's house. There an affidavit was prepared and signed by Mrs. Andrews after an agreement had been reached that Moore was not to use the information about her past.

The affidavit signed by Mrs. Andrews early in the morning of September 9th, 1922, repudiated the testimony she had given at the trial and claimed she had been induced to make the identification because of pressure exerted by Mr. Williams and by police officers Stewart and Brouillard. This was supplemented two days later by another affidavit affirming as correct the statement she had given the defense before the trial in which she had said that pictures of Sacco did not resemble the man she had seen on the day of the crime.

The motion based on these statements claimed:

"11. That the facts, matters and things contained in this motion, together with the accompanying affidavits and the testimony of said Andrews on the trial of this cause, reveal that the said Andrews is an utterly and hopelessly unreliable and untrustworthy person without the moral stamina and moral courage to tell the truth, or possibly without sufficient mental capacity to determine which is true from what is untrue, in that they reveal:

"a. That previous to the trial of this cause the said Andrews gave a statement to defendants' counsel utterly exonerating the defendants and each of them as having been at, near or about said automobile hereinbefore referred to.

"b. That during the trial of this cause the said Andrews testified directly and unqualifiedly contrary to the last set forth statement of facts and that she then claimed that her statement given previously [3894] to trial was untruthfully reported, but that she now claims that her testimony given on the trial was given under duress, intimidation and coercion.

"c. That she now makes a repudiation of her testimony given upon the trial of this cause and confirms the statement given previous to the trial of this cause, now admittedly giving such repudiation and confirming her original statement as given to said Moore either in response to an appeal directed to her sense of justice and a square deal and to her conscience, or in response to the appeals of her son, Andrew J. Hassam, that she tell the truth and nothing but the truth, or under the duress of revealing her private life previous to the trial of this cause and revealing her reputation for truth, integrity and veracity in the various communities where she has resided." [3895]

Mrs. Andrews, in her affidavit said:

"That when the affiant was taken to the County Jail at Dedham by Officers Stewart and Brouillard she was told that they would take her

around the jail and let her look it over. In making this trip the affiant was accompanied by one of the jailers, an elderly man, of medium height, with grayish hair. That in this trip around the institution no prisoners were pointed out to the affiant and her attention was directed to no one. That at the conclusion of this trip she was led over to the right wing of the jail, as one comes in the front door, and was told by the said person accompanying her, to wit, one of the jailers, that she was to look at the man down on the floor below, that he was the man she was there to see.

"That the affiant looked at this man, and on returning to Officers Stewart and Brouillard, who were waiting for her, and getting into the automobile, she was asked by said officers whether he was the man that she had seen on April 15, 1920, in response to which question the affiant stated that she was unable to say, that she did not know. That thereupon the said officers, and both of them, repeatedly stated to the affiant in substance and effect, 'You know he is the man you saw' and by their manner and demeanor conveyed to the affiant the impression and idea that she had to confirm that statement.

"That thereafter and on the day before the affiant testified in said cause she talked with Harold Williams, Assistant District Attorney, and stated to said Williams that she could not identify the said Sacco, in response to which the said Williams asked the affiant if she would identify the said Sacco, whereupon the affiant said to the said Williams that she could not be positive, whereupon the said Williams, raising his hand and shaking his finger in the face of the affiant, said, 'You can put it stronger than that. I know you can.' That said conversation was not had in the District Attorney's office in the Dedham Court House, but was had in a private room in which there were two small beds, with the door closed. That the statements of said Williams were delivered in a loud, and authoritative voice and in a manner commanding, coercing and intimidating, and resulted in the affiant becoming confused and uncertain in her statements.

"That the night before the affiant first took the witness stand, Mr. Katzmann, the District Attorney, and Mr. Williams, Assistant District Attorney, called the affiant's attention to the fact that she had been seen talking in the Court House with Mr. J. J. McAnarney, one of the counsel for the defendants, and she was asked what Mr. McAnarney had asked her, and the affiant stated that he had indicated that he, the said McAnarney, desired to talk with her that night, and the affiant was then instructed by said Mr. Katzmann and said Mr. Williams that she was not to tell Mr. McAnarney what she would testify to, and she was to tell him anything that would throw him off the track.

"That thereafter and on the night before the affiant first took the witness stand she was called upon by J. J. McAnarney, one of the counsel [3897] for the defendants and was then asked by the said McAnarney whether she would identify the defendants, or either of them, to which the affiant answered that she could not and would not identify either of the defendants.

"That the affiant now alleges and states freely and voluntarily without any coercion, intimidation or threats and without any promises of reward of any kind or character whatsoever and solely for the purpose of right-

ing a wrong done by her in her testimony in the above entitled cause and to the sole end that said Nicola Sacco and Bartolomeo Vanzetti shall be granted a new trial herein, that each and every part of her testimony in the above entitled cause wherein she, the affiant, identified the said Nicola Sacco as the person that she had seen on April 15, 1920 is false and untrue and now alleges the fact to be that the affiant well knew at the time that she testified and now knows that she, the affiant, had to the best of her knowledge, information and belief never at any time or place or under any conditions and specifically on April 15, 1920 at South Braintree, seen said Nicola Sacco until she saw him in the Dedham County Jail, he being pointed out to her by one of the jailers, as hereinbefore set forth." [3838]

Mr. Katzmann called Mrs. Andrews to the Court House at Dedham on January 9th, 1923, and questioned her in the presence of Mr. Williams and a deputy sheriff. On that occasion she claimed that her feelings had been played upon by Mr. Moore and her regard for her son misused. She said she had been frightened that evening and was nervous and could not remember what she had signed. Some of her deposition is here given:

"Now, taking it easily and comfortably, will you tell us in your own way just what happened at Mr. Moore's house, all that you can recall?—Well, they started talking at once with Mr. Moore about how they had brought me over and that they were positive I was going to do the right thing; that they were sure that I was a woman that had been—well, in their words, the way I took it, I had been twisted around in my evidence through fright or something, and that perhaps I was nervous and testified to something that I really had not ought to have done. It was such a shock to me that I seemed to be unable to speak, or sense what was going on around me. The knowledge that my son should be brought into it and seemed to be used as a weapon against me, why, it almost stunned me. All the time that the talk was going on, there was a stenographer that was writing, both in the room where I was talking with Mr. Moore and outside.

Let me interrupt you. Do you mean there were two stenographers?—Yes

Of course, you could see the one that was in the room where you were?—Yes, and the other one was right outside working and I could see her sitting at a little desk outside.

Two young lady stenographers?—Yes.

Who else was in the room besides yourself and the stenographers?—Mr. Moore and Mr. Van Vorbrick and Fred and my son. I do not remember the stenographer's name although they introduced me.

Was there any stenographer at your son's room at the Hotel Essex?—No, sir.

Now I interrupted you to ask those questions when you were telling me of the talk on your entrance to Mr. Moore's home.—Well, they still talked about my lying at the trial. They said that every one knew that I had testified falsely and that all the people in Quincy—both where I was employed and everywhere—knew that I had told a terrible lie.

Who said that to you?—Mr. Van Vorbrick. He said that he had come here through some Order, I believe, or through some Union, or something, to get proper evidence to clear these men and they were going to get it. He then turned to my boy and told him that he wanted him to use his influence to have me see that I had told a lie, that I did not at any time see Sacco at South Braintree, or at the time that I saw him in the jail, or at any time did I ever recognize that man and that everything [3915] that I said in the court was a lie and that I knew it. That is just how he said it to me. . . . I told them that if I put my name to the paper that they had already drawn up for me, that I was ruining all my future and that I could see that it meant a terrible disgrace for me. [3916] . . .

They told me no, that I was doing the grandest thing a woman could do, and that by doing what they wanted me to do I would gain the respect and friendship of every one, and that my boy would not be ashamed to look upon me as his mother, and the evidence that they had brought with them from Maine would not be submitted to the court or to the eyes of any one, not even to my son. On the other hand, if I refused they would use the evidence against me and that things would be made very disagreeable for both me and the son. I broke down and started crying. I asked them again if I could go home. I did not want to sign no papers, that I was in no condition to. They did not seem to take any notice of what I was saying, and my son offered no aid whatsoever. They let me rest from talking for a few moments, and left the room, returning with a colored man who they said was a Justice of the Peace. They then told me to sign my name to the paper and they started reading. I remember hearing the name of Sacco and Vanzetti being called, and I heard them saying something about that I had lied. He then took me over—

Who is 'he'?—Mr. Moore took me over to a small desk and laid the paper in front of me and told me to sign it. I told him I would not do it, for I did not realize what I was doing. Mr. Van Vorbrick and Fred both came over to me and patted me on the shoulder and told me to brace up and come through clean, that they knew that I was intending to do right, and that I was a good woman down at heart but that I had been misled. They dipped the pen in the ink and tried to pass it into my hand. I refused again and said, 'No, I can't sign it.' All the time I was crying and asking them not to force me to sign it. My son then said, 'Mother, I want you to sign that paper, for it means a whole lot to me.' I do not seem to remember much what happened after that, only that some one of the three men—I do not remember which one did it—put the pen in my hand and told me to sign it, and asked my boy to come over to me and help me. My boy came over and put his arm around me and said, 'Mother, sign this paper and have an end to all this trouble, for you did not recognize these men,'—meaning Sacco and Vanzetti,—'and you will be only doing a terrible wrong if you send those men to the chair.' They made me believe that my evidence would be the sole means of electrocuting those men, if they were, and under that impression that perhaps I could have made a mistake in the identity of

Sacco, and not having the affidavit showed, to protect the boy I signed my name to the [3917] paper. I was completely exhausted afterwards. They told my boy that 'Now, your mother needs you, we will leave you alone.' They left me alone with my son. I cried and told the boy that I felt as though I never could look any one in the face again, whereupon he told me that he knew that I had done the right thing and that he was proud of me, and that he would stand by me, and Mr. Moore, Van Vorbrick, and Fred would be my fast friends; that they would be the ones that would care for me, you know, meaning if anything happened, I suppose, that they would aid me. Then Mrs. Moore came in with a tray of hot tea. She gave me tea and took me down to her room to rest a few moments before we started home. When I got home to Quincy it was four o'clock in the morning." [3918]

Mrs. Andrews denied having intended to retract the testimony given at the trial and said she had been forced by Moore to sign the affidavit. Portions of it were read to her by Mr. Katzmman and repudiated by her. She was also asked about the circumstances of her visit to the jail and said she had on that occasion told Stewart "I hardly feel as though—I don't know what to say one way or the other. I am afraid I won't do right, but I think it is the man." [3927]

Asked about her past and what Moore might have been able to dig up:

"Is there anything about your past, Mrs. Andrews, that you are disturbed about? Is there really anything?—Why I can not see what I have ever done that is so disturbing.

None of us know, and I wondered what it was.—I don't see, I can't see what I have ever done that is so disturbing. I got my divorce from my husband. I was justified in getting it, and I will tell you this much, what Moore said to me, or his hirelings,—he did not exactly say it, and he did not prove very much of it, either. I said to him, I said, 'Even when a rat is cornered, it will fight.' I said, 'You have me cornered, but I am going to fight you now.' I said, 'I don't care what you have brought up from Maine.' I said, 'What you have brought up from Maine does not interest me at all, but bring something from Quincy. I am living in Quincy.' He turned around and said, 'Ah, ha! That is just what we are sorry that we can not get you on.' He said, 'In Quincy, Mrs. Andrews,'—and I am proud to say this to you—he said, 'You have never yet been known to be idle in the city of Quincy, and' he said, 'I will give you credit for that. You have done all kinds of work,' he said, 'and we have found that out. We have searched it.' I said, 'Bring an officer from Quincy in here, as they are in my years of work in the restaurant and taking care of sick people and everything, if I was ever spoken to in any way, shape or manner in the city of Quincy.' I said, 'What you have brought from Maine—' He said, 'Stop! What you are saying, you do not realize what bearing it has on your boy now.'

This Fred is not Fred Moore, but the other one?—Yes, the one with the crippled hand. I do not know his last name, but you could tell him by that

Why, you would think I had committed some unpardonable sin or something, or I was a fugitive or something." [3938]

Affidavits were submitted by the prosecution from Katzmman, Williams, Stewart and Brouillard denying that any coercion had been used in obtaining her testimony. The turnkey at the jail and the person who had accompanied Mrs. Andrews to the room in which she saw Sacco both swore they had not pointed him out to her. Neither side submitted an affidavit from the son.

Before the Lowell Committee some testimony on the subject of Mrs. Andrews was adduced:

ALFRED N. LABRECQUE, member of the Massachusetts Legislature and war veteran, who had been a neighbor of Mrs. Andrews in Quincy, testified about her reputation:

"Well, my personal experience, I would not rely at all on her veracity. . . . Her general reputation [for truthfulness] is not very good. . . . She had several hysterical outbursts in that room she had there, and she come running out in the corridor on numerous occasions, pulling her hair, and was in a very highly nervous condition, and in such a condition that one would doubt her mentality, whether she was right mentally or not. When I was in the insurance business I insured two risks in the Workmen's Compensation in one of the Guays System Bakery on Hancock Street, she was employed there, she was employed there about three days, and she threw what we term a fit and claimed that she was injured there by coming into contact with an electric wire, if I recall the case, and we paid her compensation, the Company paid her compensation for two or three weeks, until we made an investigation, and then they stopped payment of her compensation. The investigation was at the request of the owner of the business . . . and her history, according to the records of the Company that I saw was that she had made numerous attempts to procure compensation for injuries that the Company alleged she had never received." [5157]

MISS PREED, who had been stenographer for Mr. Moore and later for Mr. Wiggan, the Governor's advisor, testified that the defense had expected to use Mrs. Andrews as a witness and that she herself had been astonished to see her appear for the prosecution [5201].

2. WILLIAM S. TRACY, in the real estate business in South Braintree, had on the day of the crime had some errands which, soon after 11:30, had taken him past the Square. There he had seen two men:

"I saw two men standing with their back to the window of that store, the window nearest the corner of Pearl Street, and I went into the store and did my errand in there and came back, and I went in a driveway back of the drug store and backed out and came around as near the corner as I could, so I observed those people within 20 feet, and I then went home and discovered I had not done my whole errand and came back again and drove right by that corner and went to the bakeshop on Pearl Street." [500]

His second passing the Square had occurred about ten or twelve minutes

after the first. The men were still there, by the drug store. He described their appearance thus:

"Well, the two men were dressed respectably, and one was a little grain taller than the other, a little bit taller than the other. The man nearest the drug store was the shorter of the two, and the other fellow, he was not in leaning position on the window, but the stouter man of the two, he stood erect, and their general appearance was that they were dressed respectably and looked as if they might have been waiting for a car.

What can you say as to their faces?—Well, they were,—one was a little darker than the other.

What would you say as to their hair?—Well, they both had dark hair, both smooth shaved." [500]

He said he had seen one of them, Sacco, in jail on February 15th, 1921, and again in Court at the trial:

"And what do you say as to his identity with the man you saw that day at South Braintree?—While I wouldn't be positive, I would say to the best of my recollection that was the man. . . .

When did you first learn of the shooting, Mr. Tracy?—Well, I learned of the shooting immediately after it happened, by telephone.

At any time did you see published in the daily papers pictures of the men arrested after the shooting?—I did. I saw a picture that came out, I think, it was in the Post." [501]

On cross-examination he said that nothing attracted his attention to the men except that they were standing against the window of the drug store. He was unable to describe the hats worn by the men, except that they were soft and dark [505]. He had not noticed if there were men leaning up against other buildings [506, 507]. He said the men wore no overcoats, but could not otherwise describe their clothing [509]. He was asked about his first identification of Sacco and about the degree of certainty that he was right:

"Where was Sacco when you saw him at the jail?—Well, Sacco, when I saw him at the jail, he was down in a pit.

They had him in a pit, all alone?—A lower place. He was all the man I saw.

So the only man you saw at the Dedham jail was the man in the pit?—The man in the pit and two men in attendance there. [509] . . .

Mr. Tracy, do you feel positive that the man in the dock is the man you saw on the sidewalk?—I did not say positively. I said to the best of my opinion.

Well, he resembles the man?—Yes, to the best of my opinion he is the man.

He is the same general height, dark complexion, and other than his height and apparent weight and build and complexion, there is no in-

dividual feature in this man that stands out, is there?—Put that again, please.

Other than his height and his general build and the fact that he is dark complexioned, there is no other individual feature of this man that stands out, is there?—Well, he looks like the man that I have seen so many times, the four times that I have seen him. I have seen him five times, now, before I see him here in this court room.

Of course, you see him in the court room, and at the jail? But the other times, you had the three observations as you went by?—Well, I observed him—happened to meet him today when he was coming in. [510]

Now, you see him at the jail. Now, you have seen him three or four times. Call it as many times as you want to, but up to the time when you first went to this jail, you had not seen but, as you have already described, those three observations?—Those three observations.

Do you feel now, Mr. Tracy, you could not be mistaken on that man?—Well, I said that to the best of my opinion he was the man.

I ask you, do you feel you could not be mistaken on that?—Well, I suppose the best of people could make a mistake.

Well, classing you the best in answering the question, do you feel that you could not be mistaken on that identity, Mr. Tracy?—Well, I feel quite sure that I am right.

‘Might be?’ Might what?—I said, I feel I am right.

Oh, that you are right.—In my identification of this man.

Then you feel you could not be mistaken in the identity of this man?—I said I would not positively say he was the man; but I wouldn’t positively say so.” [511]

On re-direct examination, asked what attracted his attention to the men at the drug store, he said “Well, as I undertook to tell Mr. McAnarney, one thing that attracted my attention is that men are not allowed to lean up against that building.” [512]

On re-cross examination the witness said he had formed the impression that the men were Italians:

“Didn’t you go to the Dedham jail to pick out a foreigner you saw in front of the drug store?—To see if I could. [513] . . .

THE WITNESS. I did not know I was supposed to pick out a foreigner. I was supposed to see if I could identify the men who were standing in front of the drug store.

And the man you saw in front of the drug store was a foreigner?—Well, I do not know as to that. I did not reason that out at that time to see whether he was a foreigner or not.” [514]

He was not positive that the man he had seen was a foreigner and was likewise uncertain whether Sacco was a foreigner or not, because he did not consider American-born Italians to be foreigners [515]. He thought

the man he had seen looked like an Italian but did not think that the picture of the defendants in the newspaper looked so:

"So that the appearance of the man that was in front of the store and along the time of the photograph, along up to that time it was not in your mind either way that the man you saw was an Italian, was it?—No, it was not in my mind that he was an Italian." [517]

He was asked by Mr. Williams what he meant by the term foreigner, and said:

"I would call a foreigner a party who emigrates from another country to this country. I would term him a foreigner a man who is an Italian by birth, an Irishman by birth, a German by birth, but I don't consider an Italian born and brought up in this country an Italian.

That is the distinction you had in mind when you have been testifying?—Yes, sir." [518]

It was not disclosed why Tracy had not come forward after seeing the pictures in the papers or what caused him to be taken to the jail in February, 1921.

3. WILLIAM J. HERON, a detective working for the New York, New Haven & Hartford RR. Co., testified that he arrived at the South Braintree station at about 12:27 on April 15th, 1920, and while attending to some business there observed for about five or ten minutes two men in the waiting room talking to each other in Italian. He said that he had seen one of them again about six weeks later as he was coming in to the Quincy Court, handcuffed to Officer Scott. That man he said was Sacco [518]. How Heron happened to be outside the Quincy Court House when Sacco was being brought there for the hearing in May does not appear. Nor was he asked how he fixed the date of his presence in the South Braintree station. Heron was asked to describe the men he saw there:

"—One of them was about 5 feet 6 inches, weighed about 145 pounds, Italian. The other fellow was about 5 feet 11; I should say, weighed about 160. They were smoking cigarettes, one of them.

Do you know which one was smoking?—The tallest one.

Did you notice anything else they were doing?—Well, they acted kind of funny to me, nervous. . . .

What were they doing which made them appear nervous to you?—They were talking.

Do you know what language they were talking in?—Italian language.

Did you notice anything else about them?—No.—The way they were dressed.

How were they dressed?—Black—black soft hat.

What did you see them do? Anything more than that?—No. When I came out again, they were gone. [519] . . .

Are you sure he is the man you saw in the station that day?—Pretty sure.

Well, how sure are you?—Well, I saw them there that time.

Have you any question in your own mind? Have you any question in your own mind that he is the man?—No.” [520]

On cross-examination by Mr. Moore, Heron said he had come to Brain-tree in connection with the case of a boy; that he had found the boy in the station and had taken him into the ticket office.

“You didn’t pay any attention to the men when you first came in, or did you?—Not much, only I saw them smoking.

There is nothing extraordinary about men being in the waiting room smoking?—Yes, sir.

What?—Yes, sir; it was not allowed.

You didn’t speak to anybody about it? To them, I mean?—Not to them then, no.

And you went ahead and took care of the small boy?—Yes, sir.

Was there anything—After you got through with the two men, were they still at the same place in the station?—No, sir; when I came out of the office after leaving the boy, the two men were gone.

Then, all you saw of them was before you took care of the boy?—Yes, sir.

These two men were sitting down?—Yes, sir.

You said they acted nervous. What did you mean by that?—Well, one kept nudging up against the other, and he would smoke a cigarette— [521] . . .

Now, what else? You used another word in addition to nervous, that they acted funny?—Kept looking out of the window behind them, getting up, turn around, and looking out of the window.

Now, have you stated to the jury all that you considered as of the nature of ‘funny’ and of the nature of ‘nervous’?—As far as I know. . . .

This nudging that you have referred to, did that inspire you with the thought that there was something wrong?—No, I didn’t think there was anything wrong with them.

You didn’t think they acted nervous then?—They acted nervous, yes, but I didn’t think there was anything wrong with them.

Nothing funny then?—Oh, no. [522] . . .

And both men, I believe you said, were smooth shaven?—Yes, sir.

Aside from that, is there any distinctive feature of either man that you recollect?—I couldn’t say, sir.

Aside from that, they looked just the same as any one of hundreds of men you might see every day coming and going on the trains?—Yes, sir.

What?—Yes, sir.

No outstanding physical characteristic of either man? You shake your head; get that shake into the record, please.—No.

You didn’t see them with their hats off?—Off, no, sir. . . .

And, being perfectly frank and honest, Mr. Heron, you didn’t look them over with any serious thought at all, did you?—No.

And, being equally frank and honest, you don’t want to tell this jury now

that you know, beyond all human error, that this boy back here is the man that you saw in the South Braintree station, do you?—Yes, sir.

You swear that under oath?—Why, I have already.

What is the characteristic that you pick out as the characteristic that enables you to mark this man?—I don't know, only that I saw him there, that is all. [524] . . .

You didn't suggest to anybody that they be watched, did you?—No, sir.

Didn't think anything more about it, or do anything more about it, for six weeks thereafter?—No, sir." [525]

Heron had happened to be at the Quincy Court House when Sacco was brought there for a hearing. He testified about that occasion, over objection by defendants' counsel:

"—When he got out of the car, I said, 'Gee, that is the fellow I saw down at South Braintree the day of the shooting.'

Do you think that is the time Chief Galvin may have heard you?

MR. MOORE: I object to that.

MR. WILLIAMS: You brought it out yourself.

MR. MOORE: It is not a question of what he thinks Chief Galvin may have heard.

THE COURT: It is a guess, that is, 'he thinks.' That is the difficulty with it. If he has any assurance, anything in the nature of evidence that tends to show Chief Galvin was there, he may testify. If he can't, then it is incompetent.

Did you or did you not say, in answer to one of my friend's questions, Galvin must have been on the Court house steps when he came in?

MR. MOORE: I object to that.

—Yes, sir." [538]

("Galvin" was Gallivan, Braintree's Chief of Police.)

Heron admitted on cross-examination that he had refused to talk with investigators for the defense, saying at first that he had not wanted to be brought in as a witness [528], later that he had not thought his evidence important [535], and finally that he had been previously interviewed by the prosecution [536]:

[Questioned by Mr. McAnarney.] "I ask you, did you have any reason why you should not tell the representative of a man who is being tried for his life the truth and the whole truth about anything that you knew in connection with that case? Have you any reason why you should withhold from that man any evidence? If so, give it.—No, sir.

Why did you not tell Mr. Reid what you knew about this case?—Why, I didn't have to.

That may be so, you may not have to. This doesn't amuse you, does it?—No, sir.

Then, why didn't you tell him the truth when he asked it of you? I don't hear your answer.

THE COURT: If you can answer it, answer it.

—I have no answer to make to it. [535] . . .

[Questioned by Mr. Moore.]

May I ask you, Mr. Heron, if the only reason that you refused to talk to Mr. Reid was because you did not want to be a witness, as you saw fit to state to me?—Yes, sir.

Then, why did you talk to Brouillard and Stewart?—They were the first ones that came to me.

What?—They were the first ones that came to me.

Well, do you mean by that to tell the jury that you are one of the type of men that ‘first come, first served’?—In a case like that, yes, sir. . . .

But you said that the reason you talked to Stewart and Brouillard was because they came to you first?—Yes, sir.

You mean by that to say if Reid had reached you before they reached you, you would have told something else other than you have told on this witness stand?—No, sir.

Then, what is the significance of Brouillard and Stewart reaching you first?

THE COURT: You may answer the question.

—Well, I didn’t have to answer Mr. Reid’s questions. [536]

Have you any other reason, as you stand there conjuring up and thinking over this question, have you any other reason other than the variety of reasons you have already given why you did not talk to Reid?—No, sir.” [537]

On redirect-examination he stated that he had withheld from the defense nothing he thought would help them. He was then cross-examined further by Mr. McAnarney:

“So now there are three reasons: First, that Stewart and Brouillard saw you first, and second, that it would not help the defense, and third, that you didn’t have to, is that right?—Yes, sir.

And you want us to understand that all those were in your mind, [539] and you had those three reasons why you did not answer Mr. Reid, is that right?—Yes, sir.

You took it unto yourself to determine the fact that your evidence would hurt these defendants, didn’t you? Did you?—Yes, sir.

And, out of the kindness of your heart, you didn’t want to tell Mr. Reid what you knew, did you?—No, sir.

—because you thought it might hurt his feelings, is that it?—I didn’t know whether it would hurt his feelings.” [540]

4. LEWIS PELSER, a shoe worker, said that on the first floor of the Rice & Hutchins factory he had opened a window and had seen a man who was the dead image of Sacco shooting Berardelli:

“And what did you see when you looked out?—I seen this fellow shoot this fellow. It was the last shot. He put four bullets into him. [292]

You saw this fellow shoot this fellow. Who was the man that was shot?—Berardelli.

Did you know him by sight or to speak to before that?—No, sir.

You have learned since his name was Berardelli?—Yes, sir.

Where was he, the man who was shot, with reference to your window as you looked out?—Right in the front window where the stuff is.

You were in that window space?—Yes, sir.

And you were looking down towards Pearl Street?—Yes, sir.

What did you see there?—I saw him lying down.

Who?—Berardelli, after the shooting.

How was he lying, do you remember?—He was lying on his left side, and then he rolled over on his back.

What other man or men did you see near him in the street?—No one else, only the fellow that done the shooting. [293] . . .

Yes, describe his appearance.—He was kind of crouched down.

I don't mean the way he was standing, but the way he looked?—You mean his description?

Yes, that is just what I do mean.—He had a dark green pair of pants and an army shirt tucked up. He had wavy—hair pushed back, very strong hair, wiry hair, very dark.

What complexion?—Dark complexion.

How far were you from him at that time?—Oh, about seven feet away.

Do you think of anything else about his appearance that you can tell the jury?—No, sir.

You say an army shirt tucked in?—Tucked around the neck.

What do you mean by an army shirt?—One of those brown army shirts they have in the army.

You say, tucked in around the neck?—He had the collar pushed up, and I think he had a pin in it.

You think he had a pin in it?—Yes.

I wish you would look around the courtroom.—Yes, sir.

Do you see in the courtroom the man you saw shooting Berardelli that day?—Well, I wouldn't say it was him, but he is a dead image of him. [294] . . .

Have you seen him since that time until you saw him in the courtroom?—No, sir.

Have you seen a picture of him since then?—No, sir.

Have you seen a picture of him today before you came to the stand?—Well, the picture you showed me.

You say you wouldn't say it is him, but he is the dead image of him. What do you mean by that?—Well, he has got the same appearance.

Have you got any question in your own mind but what he is the man?—[Objection by defense counsel was overruled]—I wouldn't say he is the man, but he is the dead image of the man I seen." [295]

Pelser stated he next saw the man run toward the automobile and "he

put a bullet over towards where Parmenter fell." The witness saw Parmenter fall in the lot [295]. After that "he flashed a gun over towards the factory . . . two bullets right over the window where I was standing."

Pelser had taken the number of the car, which was 49783, and had made a note of it. He had seen no one else in it. "I was too anxious to get away. I was kind of scared myself" [297]. The window, he said, had been open for about three or four inches.

On cross-examination by Mr. Moore he testified that he had stayed about a minute at the window and had opened it wide. On March 26th, 1921, he had been interviewed by Mr. Reed on behalf of the defense, but had not told him everything, although, he said, whatever he had told Reed was true.

"And you talked with him freely and frankly and fully, did you not?—Yes, sir.

And told him on that day, March 26th, you told him freely and frankly everything that you knew about this case?—Not everything, no, sir.

You didn't?—No, sir.

Why didn't you?—Well, I didn't feel like telling him the whole story. [299] . . .

Other things you told him were not true, is that what you mean to tell the jury?—No, I told him parts of the story, and that is all.

Well, everything you told him was true, was it?—Yes, sir.

Everything that you told Mr. Reid at that time was a true statement of fact?—Yes, sir." [300]

He admitted having told Reid that he had seen none of the shooting.

"[Reading.] Question: 'Did you see any of the shooting?' Answer: 'Why, no. I just seen him laying there, that is all.' Did you so state to Mr. Reid?—Yes, sir.

Was that a true statement of the fact?—Well, yes, it was.

What?—It was.

It was? This is a correct statement of what you told Mr. Reid?—That I told Mr. Reid, yes, sir.

Now, is it a true statement of what you saw?—No, sir.

Why was it that you didn't tell Mr. Reid the facts?—Because I didn't want to tell my story.

Why?—Because I didn't like to go to court.

What has happened between now and then that you should tell to one side in this lawsuit one set of facts, and tell the other gentlemen in this lawsuit another set of facts? What has happened?—Well, I didn't know him well enough. . . .

Did you tell Mr. Reid a falsehood in order to avoid being called as a witness in this case?—Yes, sir." [300]

Pelser also admitted stating to Reid that he had not seen the man who did the shooting and that he had ducked under his bench. He claimed on

the stand that he had not in fact ducked under the bench:

"Didn't you duck under the bench?—No, sir.

Why did you tell Mr. Reid that you ducked under the bench? Now, Pelser, isn't it the truth that you did duck under the bench?—No, sir.

Didn't you tell counsel for the Commonwealth in direct examination that you got scared?—Yes, sir.

Then you ducked under the bench, didn't you, sir?—Yes, sir. [301] . . .

And you want this jury to believe that you stood up in that open window, with the sash opened up, with the guns pointed in your direction, and you stood there and didn't duck?—I ducked when he pointed the gun towards me.

Why didn't you tell the jury a minute ago that you did duck?—You didn't say it in a right manner.

I asked you a minute ago if you did duck, and you said no.—No.

Now, you want to amend that and say that you did duck?—Yes, sir.

You got down underneath the table, didn't you?—Yes, sir. [302] . . .

And deliberately, you now want this jury to believe, went ahead and built up this fabric of falsehood, is that right?—No, sir.

You did, didn't you? You deliberately for over an hour—— —I talked to Mr. Reed.

——lied to Mr. Reed?—I didn't exactly lie to Mr. Reed.

Did you tell the truth when you said, 'I didn't get a look at him?'—I didn't want him——

Answer my question. Did you tell the truth when you said, 'I didn't get a look at them?'—No, sir. [304] . . .

Now, Mr. Pelser, you haven't any interest in this matter, other than to see that absolute justice is done, have you?—Yes, sir.

That is all, isn't it?—That is all.

And Mr. Reed talked with you courteously, and asked you to give him the facts in this matter, didn't he?—Yes, sir.

And you haven't any explanation to give—— —No, sir.

——for something over an hour giving the substance of what you now want this jury to believe was a false statement? You haven't any explanation to give for making that false statement for over an hour, except that you wanted to avoid being called as a witness in this case?—Yes, sir.

That is all?—That is all. [305]

And yet you knew that Mr. Reed told you in that conversation that the kind and character of the statements you would make might mean that the defense would want to call you as a witness in this case, didn't you?—Yes, sir.

He told you that, didn't he?—Yes, sir.

That the defense might want to call you, because you had stated repeatedly under his examination that while you were in that window that you found it utterly impossible to identify anybody?—Yes, sir.

Then you do have an interest? If you were going to be interested any-

where in this law suit you intended to be a witness on the side of the Commonwealth, is that the idea?—Not exactly.

MR. KATZMANN. I object. The answer was not audible in view of the fact that Mr. Moore started another question.

THE COURT. Start a new question.

What do you mean by 'Not exactly?'—I didn't want to come to court at all." [306]

Pelser said also that he had not told his story to the Commonwealth's representatives and claimed that, until he took the stand, no one had known he was going to identify any of the defendants.

"Do you mean to tell this jury that you divided your attention, and identified first the man standing up here with a loaded gun firing at random into a crowd, you identify him first down to the pin in his collar, while on the other hand you took the number on your right of the approaching automobile?—Yes, sir.

And then turned and wrote the number down?—Yes, sir.

But kept the description of the man safely locked up in your own mind?—Yes, sir.

Absolutely locked water-tight from the Commonwealth on the one side and the defendant upon the other in this law suit until you took the witness stand today?—Yes, sir.

Never talked to a living soul and told them what you intended to say on the witness stand today, and told them the truth, until you got on the witness stand?—Yes, sir.

Is that right?—Yes, sir.

You didn't even tell the Assistant District Attorney, Mr. Williams, the truth until you took the witness stand?—I don't get what you mean.

I say, you didn't tell even him until he put you on the witness stand?—Yes, sir.

Is that right?—Yes, sir. [314] . . .

You told him the story that you told here today, or another story?—I didn't tell him any story at all.

Did you tell him the same set of facts that you have told here today?—Yes, sir.

And what peculiar quality of Mr. Williams' personality or points or persuasive powers were there that enabled him to wring from your lips the story that Mr. Reid was not able to wring?

MR. KATZMAN: That question I object to.

THE COURT: I exclude it as an improper question, because you assume that somebody wrung something out of him without any evidence to that effect." [315]

It now appeared that Pelser had been recently re-employed by Rice & Hutchins and had talked the case over with his boss a few days before testi-

fying [320, 1]. After the arrest of the defendants he had made the statement to the police that he had not seen enough to be able to identify anybody [322].

In contradiction of Pelser's testimony the defense produced three fellow workers, BRENNER [1122], McCULLUM [1149], and CONSTANTINO [1166]. They testified to the general effect that Pelser had not been at the window at the time of the shooting and that they had all ducked under their benches when they heard it. Constantino also testified that he had seen Pelser get under the bench when McCullum raised the window [1168] and that he had heard the former say after the shooting that he had not seen anyone [1172].

On cross-examination Constantino testified:

"Between that Saturday noon of this month and the afternoon of April 15th, 1920, have you ever thought of where Pelser was at the moment of the shooting?—Not until I read his testimony, but——

That is, you haven't ever thought of it between those dates where he was?—Yes, sir.

When have you thought of it?—Oh, always thought. I worked there so long.

You always thought where he was? Where was he at four o'clock that afternoon?—He was at his place for working.

Where was he at four o'clock on the afternoon of April 18, 1920?—I don't know.

Where was he at three o'clock on the afternoon of April 16th?—I do not know.

Where was he at three o'clock on the afternoon of April 23d?—I can't keep track of a man.

April 30th. April 30th, where was he on the afternoon of April 30th at three o'clock in the afternoon?—I think you think I am a fortune teller. [1181] . . .

When next after the day of the shooting did you bring your memory back to where Pelser was at the moment of the shooting?—I never thought of it till after I read his testimony.

So that fourteen months went by before you gave any thought to where Pelser was and then you remember instantly where he was?—I could not help it." [1183]

It was brought out on the redirect-examination of this witness that he had volunteered after reading Pelser's testimony in the newspaper. [1190]

After the trial Mr. Moore obtained a retraction from Pelser, which was used on one of the motions for a new trial.¹ On February 4th, 1922 Pelser signed a statement in which he reaffirmed the interview he had given to the defense before the trial to the effect that he had been too scared to notice any one. He suggested that the assistant District Attorney, Mr. Williams, had more or less persuaded him to make the identification:

¹ See page 114, for discussion of Judge Thayer's decision denying this motion.

"Did you tell him in clear cut definite terms you did not see any man enough to be able to identify?—I told him I just got a glance of everything, that's all I seen. I said I could not identify if you brought me a hundred pictures here.

Did you tell him that, that you could not identify the picture or the man himself, if he brought a hundred men?—Yes, I did. He said something like, 'You know right well that's the man,' something like that. . . .

And when you say that, you screw up your face—'You know right well that's the fellow?' He said it in a way that impressed you that you had to come through?—Well, he did not really force me.

Did you think you were being forced?—Well, I did in a way—yes.

What was the reason you thought you were being forced?—He said, 'You make sure, you go downstairs and take a look at these men. I said, 'I will take a look at them.' [5567] . . .

You went back up to Williams' office after dinner, after seeing him?—I took a walk around the building.

Then you went upstairs, what did Williams say?—He said, 'What do you think about him,' or something like that.

What did you say?—I did not say much. I think I said I don't think that is the man. Something of that sort.

Well, you said, you just said you did not think you knew him? You know now?—I could not tell you it's so long ago.

You know whether you identified him or not?—Did you tell Williams that he was the dead image of the man or did Williams tell you that?—I think Williams said it to me, something like that, I could not tell you.

Did you ever use those words in your life before?—No.

Are those the kind of words you would ever use, that a man is the dead image of another man? Did you ever use them?—I don't know how I was forced to say them words. [5568] . . .

Did you see any man in the street with a gun in his hand?—Yes, I did.

Was that man that you saw in the street, Sacco?—No, that was not Sacco.

Now let me get this straight. Do you say it was not Sacco?—It was not Sacco.

Do you say it was not Sacco or do you say it—in other words you don't know whether it was or was not Sacco?—Yes.

Is that the point?—Yes.

I want to get this straight. I am not asking you to tell me it was not Sacco. I am asking you whether you saw any man sufficiently to say now whether it is or is not the man?—No, I don't.

You don't what?—I can't say whether—what do you mean?

Are you attempting to tell me now, that is not the man?—The fellow I saw on the street I could not identify.

Did you get enough of a view of him to be able to tell whether in any respect what shape, manner or form he resembles, the man that is now presented to you as Sacco? Now, Pelsner, you have got one stumbling block, here that you have got to get over and you are the only man in the world

that can hurdle it. You have told a jury of 12 men under oath in a court that Sacco is the dead image of the man that you saw—you told it under oath, you told it to 12 men, now you, yourself, can tell why you told that as you told that if it was not the truth. You have got to develop your own explanation.—I don't know how I twisted around that dead image stuff.

What peculiar sort of a power over you did Williams have?—I can't tell you.

If you should be called, if we should ask you to take the witness stand and ask one simple little question, namely, 'Did you tell the truth or [5576] an untruth when you told the jury in this case that Sacco was the dead image of the man you saw on April 15th, 1920 at South Braintree,' what would you answer?—All I could say, I was not in my own mind at all.

That is not an answer unless as a result of being out of your mind you have told an untruth. Is the statement that Sacco is the dead image of the man you saw, the truth or untruth?—Untruth.

You are making the statement freely and voluntarily and willingly and you have the moral courage and the moral stability to go on the witness stand, if necessary, in this case and swear that that is not the truth?—I could not actually say that—I could not say that after I have——

You can tell anything that is the truth. If it's not true that he is the dead image, then you owe it to yourself and your conscience to tell it. If it is the truth, for God's sake stick to your story.

It might come to the pinch where in order to save a couple of men's lives it is going to be necessary—you have got the stuff to come through if it is necessary to come through, that right?—Yes." [5577]

A day or two after he made this statement for Mr. Moore Pelser wrote a letter to Mr. Katzmann:

"Saturday afternoon a man called for me in regards the Sacco case. He did not say which side he represented.

He asked me if I could give a little information on the case.

I was drinking pretty heavy that day. He said I want to show a couple of pictures and got me on the way in town gave me some money bought a dinner cigars & cigaretts we went into some office in Pemberton Sq. he introduce me to Mr. Moore then he sat me down & locked the door Moore said to me you look like a white man.

"He patted me on the back & gave me a Cigar & said give me a little dope on the Sacco Case he handed me a couple of pictures & asked me if I ever saw them. I said 'no', he showed me some more. One word led to another, he got around me some way & I didn't know what I was up against. He had 3 or 4 men in his office & a girl stenographer. He asked me one question & other and finally had my whole story contradicted what I had said at the Dedham Court. I am worried at the way they have framed me up & got me in to trouble. When it was over one of the men [5584] asked me if I would not have a drink & invited me to a big dinner & dance at the West Minister Hotel. Some how I refused to go because I felt it was another trap to get me to say more.

When I came to my Senses the next day & had a little talk with my folks they told me to get in touch with you as soon as I could I tried to get you on the phone and then decided I had better write you.

Hoping you will give this your immediate attention and favor me with an early reply.

Respectfully

Louis Pelsr.

P. S. I forgot to mention that I also signed two papers of some kind.

[5585]

L. P."

He was then interviewed by Mr. Williams, withdrew his repudiation and absolved Williams from any charge of having forced the identification:

"And I asked you to go down to the rear entrance when he was brought in. And then you saw me again a few minutes before two o'clock in my office.—Yes. I think I came right back to your office. I met you in the hall and went into your office.

We went over in the corner by the window in the front of the office.—Yes, sir.

And I said, 'Is Sacco the man.'? And you were standing there and the sweat was pouring off your forehead, and you said, 'By George! If Sacco isn't the man, he is a dead ringer for him.' And then I said, 'It is your duty to go into Court and testify to the truth.'—Yes, I remember that. . . .

And what you said on the stand that day was the truth as you then believed it?—As I believed it.

And have you had anything happen to change your mind in regard to the testimony that you gave that day?—No, sir. All I could say is that I was a nervous wreck afterwards.

You were nervous when you got on the stand?—Yes, I was a wreck.

And you were in a hard position.—Yes. [5589] . . .

They bought you some cigars and cigarettes?—Yes, sir.

Who bought those?—Doyle bought a couple of packages of cigarettes and Mr. Moore gave me a couple of cigars.

Did Mr. Moore pat you on the back?—Yes.

What did he say when he patted you on the back?—He said, 'You look like a regular fellow, a white fellow.' [5591] . . .

Was the door locked?—The door was locked first, and then after they got me going they opened it, and then closed it.

Were you frightened?—I was in a way. I knew I was up against it.

And because you were frightened, was it one of the reasons why you talked as you did?—Yes, sir.

Were there any Italians there?—No. . . .

Now, did they say or any one of them say what they would expect you to do in the future?—Well, I told them I didn't want to go on the stand any more for anybody.

Did they ask you to go on the stand?—They asked me, 'In case you have to go on the stand, will you go on the stand?'

What did you say?—I don't know what I did say.

Did they make any promises as to what they would do for you in the future?—Yes, they said they would get me a job.

Where did they say they would get you a job?—They didn't tell me anything." [5592]

5. MARY E. SPLAINE, a bookkeeper for Slater & Morrill, had, after hearing the shots, looked from a window on the Pearl Street side of the Hampton factory (near the station), just after the shooting, glimpsed the automobile for an instant as it left the railroad crossing, and observed the body of a man leaning out of the car [222]. She characterized this man's hand as large and denoting strength, and gave a detailed description of his face:

"Can you describe him to these gentlemen here?—Yes, sir. He was a man that I should say was slightly taller than I am. He weighed possibly from 140 to 145 pounds. He was a muscular,—he was an active looking man. I noticed particularly the left hand was a good sized hand, a hand that denoted strength or a shoulder that——

So that the hand you said you saw where?—The left hand, that was placed on the back of the front seat, on the back of the front seat. He had a gray, what I thought was a shirt,—had a grayish, like navy color, and the face was what we could call clear-cut, clean-cut face. Through here [indicating] was a little narrow, just a little narrow. The forehead was high. The hair was brushed back and it was between, I should think, two inches and two and one-half inches in length and had dark eyebrows, but the complexion was a white, peculiar white that looked greenish.

How long was he in your view, do you know?—Now, the distance that it took him to travel from the middle of the street, from the middle of that distance to that corner.

You say 'The middle of the distance.' You mean what?—The middle of the distance between the railroad track and the corner of Pearl and Railroad streets.

That is practically to the cobbling shop that is on the corner of Pearl and Railroad, isn't it?—Yes." [223]

She said she had seen this man three weeks after the murder at the police station in Brockton and she picked Sacco out in court as being he. [224]

On cross-examination by Mr. Moore she said she had seen no one else at the windows, at the crossing, or at the railroad track. She denied having seen the man's right hand:

"Well, now, this man leaning against the forward seat of the car, back of the forward seat of the car, I understand you to say he was not firing anything?—I did not see him fire. He was not leaning against the front seat of the car. He was leaning out of the car. He was steadying himself against the front seat.

That is, with his back to the front seat or side or what?—He was facing out slanting from the car. [230]

Then his both hands were inside of the body of that car, were they?—I saw his right hand,—I mean, his left hand, inside the car. I do not know anything about his right hand.

Do you remember testifying on the preliminary examination in this case as follows, in response to questions asked, I believe, by counsel, by Mr. Adams?

MR. KATZMANN. The page?

MR. MOORE. Page 50. At the bottom of page 50.

A. 'He stood there with one hand resting on the front seat and the other hand discharging.'

—No, sir, I never said that in Quincy.

What?—No, sir, I never said that." [231]

The record of that examination at Quincy was later read to the jury. It showed she had testified as quoted by Mr. Moore. [1678]

Miss Splaine first denied having said at Quincy she was not sure it was the man, but on redirect-examination she admitted she had so testified:

"'Q. Your opinion is he bears a striking resemblance to him? A. I could be mistaken.'

You remember so testifying?—Yes, sir.

'Q. You are not sure that he is the man? A. No.'

—No, I did not say that.

You did not say you weren't sure?—No.

I want to be entirely fair with you, Miss Splaine.

'Q. You are not sure he is the man? A. No.'

—I did not make that answer.

You did not make that answer?—No.

Now, this man whose left hand you saw but whose right hand [232] you could not see, where was his body with reference to the car?—He was leaning from the right-hand side of the car. . . .

You saw his head, you saw his left hand, you saw his body inclined outside of the car, and yet you haven't any idea what the right hand was doing?—No, sir, I never looked at his right hand.

It did not excite any suspicion in your mind that possibly the man that you saw might not have any right hand?—I never looked at his right hand.

You never thought of it?—No, sir, I did not think about his right hand.

At any rate, these matters that I have directed your attention to in your testimony are all matters of error in the record?—Those things to which I have taken exception are errors.

Including this statement:

'Q. Do you say this is the man? A. I will not swear positively he is the man.

Q. You did not get a sufficient look to say positively this is the man? A. I would not swear positively he is the man.'

—I did not answer that question that way.

Do you want to say that this is not a correct transcript of your testimony?—I should say that was an incorrect transcript of that answer.” [233]

[On redirect examination.]

“Miss Splaine, in view of what I have just asked you, do you wish to change any part of your testimony which you made yesterday?—That question, I think the question was, ‘Do you positively identify the man,’ and in the Quincy court—

MR. McANARNEY. The answer should be Yes or No.

My preliminary question, Miss Splaine, is, Do you wish to change any part of your testimony that you made yesterday.—Yes, sir.

THE COURT. Now, you may change what part of your testimony that you desire.

What part of your testimony would you like to change at the present time?—That question and answer where you asked me if I positively identified the man, and in Quincy I said I didn’t feel I would positively identify him. I said I didn’t say that yesterday, but, on reflection—

‘Do you say this is the man?’ and your answer, ‘I will not swear positively’——That was the answer in Quincy.

Now, Miss Splaine, it was brought out by Mr. McAnarney, and you say it is the truth that question was put to you in the Quincy court, and that you made that answer?—Yes, sir.” [251]

Miss Splaine admitted to Mr. McAnarney that after the shooting she had identified the picture of a man as being that of the one she had seen in the car and that she had later been told that this particular person was in jail at the time of the crime:

“Did you not say, ‘There, I think that is the man that I saw leaning out of the car’?—He had some of the features, but not all.

Pardon. Can’t you answer that question yes or no?—No.

Did you not say, Madam, in substance, that the features of the man on one of the photographs shown to you were in substance the features of the man that you saw leaning out of the car?—They were a striking resemblance to the man.

That is what you said?—Yes,—a ‘striking resemblance.’

Didn’t you put it a little stronger than that?—No, sir.

Are you sure your words were ‘striking resemblance’?—I am quite sure, yes, sir.

Later you learned that man was in Sing Sing at the time of this—I don’t know the word he used, but you learned it was not Sacco?—I learned the man was not at large.

The man whose photograph you picked out as a striking resemblance to the man leaning out of the car you learned later was in some other jail for some other offence? You learned that, didn’t you?—Yes, sir, I did. [244] . . .

So, in describing this man whose picture you saw in the Rogue’s Gallery,

and whom you learned was in jail for some other offence, you said then to these men, Captain Proctor and others, he bore a striking resemblance to the man you saw leaning out of the car?—In some features.

Pardon, you said he bore a striking resemblance to the man you saw leaning out of the car?—In regard to some features.

You said 'striking resemblance,' didn't you?—That is not the whole answer.

Did you use the words 'striking resemblance'?—I said, a striking resemblance in some features." [245]

Long after the trial, in 1926, Miss Splaine, then Mrs. Williams, was shown a picture of Joe Morelli. She admitted it resembled Sacco and there was some dispute as to the extent of the resemblance she found. [4470, 4606]

According to a Pinkerton report (not available at the trial), she had also on April 20, 1920, picked out a picture of one Palmisani, known as "Tony the Wop," as being that of the man she had seen [4539]. The report showed, too, that Wade and Bostock had picked out the same photograph [4540].

She was at the trial asked about the distance the car traveled while in her line of vision and gave an answer inconsistent with the one she had made at Quincy:

"Try and put your mind back there that day, and see if you don't recall that your vision was only while the automobile was traveling half the distance from the railroad track to the corner where the cobbler shop was.—My vision of the car was from the railroad track to the corner.

I am now reading the last question on page 51 of the record:

'How long an opportunity did you have to make an observation of him and his features? A. The machine traveled about half the distance from the railroad to the sidewalk, a distance as I think would [241] be probably 60 to 70 feet, and half that distance would be 30 to 35 feet.'

Did you not so testify May 26th, last year, in the Quincy Court?—I think I said that was the distance at that time.

And that distance hasn't grown longer since, has it?—I just made an estimate of it at that time.

You haven't measured it since, have you?—I walked over it once." [242]

Miss Splaine described how Sacco had first been shown to her:

"When you saw the defendant Sacco he was alone except he was accompanied by an officer?—Yes, sir.

He was not stood with other men, or other Italians, or any other person, from whom you were to pick out any man? He was brought into the room by the officer, and you looked at him. That is what transpired?—Yes, sir." [248]

On redirect-examination she amplified this last testimony:

"Did you identify the defendant at any time previous to your being asked in regard to him?—As he entered the room.

And how long before you were asked in regard to him was that?—Oh, perhaps maybe a half an hour.

Had anybody told you at that time that he was the defendant in custody?—No, sir." [250]

On cross-examination by Mr. McAnarney Miss Splaine expressed the opinion that her opportunity for observing the man had been sufficient; yet at Quincy she had testified that she did not think her opportunity afforded her the right to say that Sacco was that man:

"Miss Splaine, you really did not have [239] sufficient opportunity to observe that man to enable you now to say that you recognize him, did you?—Yes, sir, I think I did.

Do you mean that?—Yes, sir.

And you have meant that right along, have you?—Yes, sir.

From the time you saw that man on the day of this awful tragedy you felt right in your own heart and conscience that you had sufficient opportunity of observation to enable you to say that this is the man?—I felt that he was the man.

(Conference at the bench.)

You answered that last—You answered the question by stating that you felt that you did have sufficient opportunity to identify this man?—I felt that it was possible to make a mistake, but I never admitted that I ever made a mistake or do make a mistake.

Do you feel that you had sufficient opportunity, time of observation and position of observation, that you feel you had opportunity sufficient to say that this is the man?—Yes, sir, I think I did.

I now direct your attention to the official record, at the bottom of page 57, the last question:—'You don't feel certain enough of your own position to say he is the man?' That is the question. I will now read to you your answer given in the Quincy court on the 26th day of May, 1920. 'I don't think my opportunity afforded me the right to say he is the man.' You so testified in the Quincy court on the 26th of May, a year ago?—Yes, sir, I did make that statement.

And if you made that statement, you meant it as the truth?—At that time I did, yes." [240]

Miss Splaine later told Mr. Williams she was now sure Sacco was the man because she had had additional opportunity for observing him in the Quincy courtroom. [252]

On further recross-examination it appeared she had not seen Sacco since her testimony at Quincy and that she had changed her mind without having made any further effort to observe him:

[Questioned by Mr. McAnarney.]

"Your answer now is that you feel most certain that he is?—Yes.

That is not the position that you are sure beyond any doubt, is it? You are most certain now, aren't you?—I am positive he is the man, certain he is the man. I admit the possibility of an error, but I am certain I am not making a mistake.

Your answer in the lower court was you didn't have opportunity to observe him. What did you mean when you said you didn't have opportunity sufficient, kindly tell us, you didn't have sufficient opportunity to observe him?—Well, he was passing on the street.

He was passing on the street, and you didn't have sufficient opportunity to observe him to enable you to identify him?—That is what I meant.

That is the only opportunity you had?—Yes, sir.

You have had no other opportunity but that one fleeting glance?—The remembrance of that.

Which is half the distance between the railroad track and the cobbler shop 30 or 35 feet with this car going the speed it was?—Yes, sir. [253] . . .

[Questioned by Mr. Moore.]

The defendant Sacco that morning did kneel forward in a crouching position in your presence?—No, sir, he did not.

Did he take and put on his hat or cap?—He took off his hat.

Did he turn around in different positions with the light facing him and in front of him, in back of him and in side of him as he was directed?—No, sir. I walked around him.

You walked all around him?—Yes, sir.

With his hat on and with his hat off?—Yes, sir.

Did he sit down and stand up during part of that examination?—Yes, sir.

Did you at any time, or any one else in your presence there, ask him to take any particular position?—Yes, sir.

Was that at your request?—No, sir, not at my request.

Whose request was that?—Miss Devlin.

But, it was in your presence?—Yes, sir.

And the position that he was requested to take he did take?—Yes, sir.

Now, you saw him four or five times that day, didn't you?—I saw him twice that day,—well, three times including when I first saw him at the doorway coming in, but twice when I looked at him afterwards.

All told, the time that you looked him over in these various positions, with his hat on and with his hat off, and walked around him, and so forth, consumed upwards—these various occasions—upwards of a couple of hours, didn't it?—I don't think so. I saw him while he passed through the room, and while he was in the room I don't think I took more than five minutes to look at him.

You saw him all you wanted to see him?—Yes, sir.

You saw him in every way and every position that you wanted?—Yes, sir.

And he also was present in court at the time of the preliminary examination?—Yes, sir.

And you saw him there for a matter of I suppose three or four hours, at the preliminary examination?—I couldn't say just how long.

At any rate, when you took the witness stand at the time of the preliminary, you looked right square at the defendant, didn't you?—Yes, sir.

And you looked at him during the entire period of your twenty-five or thirty pages of testimony?—Yes, sir.

And you haven't seen the defendant from that time since you saw him in the Brockton jail all that you wanted to see him and the time [254] that you saw him on preliminary, you haven't seen him from the day until you saw him in this courtroom, have you?—No, sir, I did not.

You availed yourself of every form of opportunity of observation of that young man during the period in the Brockton jail and the police court?—Not in jail; in that room. I didn't see him in jail.

And you haven't seen him since?—No, sir.

And it was with all those opportunities of observation, which had not in any wise been supplemented since—— They haven't been supplemented since? You haven't had any further opportunities of observation?—Not since Quincy.

But, it was with those full opportunities of observation to your complete satisfaction that you testified 'I don't think my opportunity afforded me the right to say he is the man'?—I made that answer.

What?—I made that answer.

With all those opportunities of observation?—I wasn't thinking of all the opportunities.

I say, you did have all of those opportunities of observation previous and before you testified as you have stated that you did testify?—Yes, sir, I did.

And you have had no further opportunities since that time?—No, sir. . . .

[Questioned by Mr. McAnarney.]

In the Quincy court, when you take the witness stand to testify the defendant in the dock is as near to you as the third gentleman on the jury, pretty near?—He was in back of me, as I remember.

He was a little to your side and back, and your distance is about from you to this juror, is it not, from the witness box in Quincy to where the defendant sits?—I think so, yes.

And that I may have the situation correct, you testified in the Quincy court and then you did not see him until he came in here?—No, sir.

So that you testified and gave the answer which has been given, about not having a sufficient opportunity, and then changed your mind without looking at the man again?—Not since I saw him in Quincy.

In other words, you changed your mind as to whether he was the man without making any further examination of him, didn't you?—Yes, sir." [255]

Miss Splaine's testimony in regard to the size of Sacco's hand was disputed in an affidavit given in 1926 by Herbert C. Dow, President of the Nickerson Company, retail sellers of gloves in Boston. He stated that he

had measured Sacco's hand, had found his right hand to measure an 8, and his left a $7\frac{3}{4}$, and that both were smaller than average [4525, 4526].

6. FRANCES J. DEVLIN, another bookkeeper who worked in the same room with Miss Splaine, had also seen the automobile crossing the railroad tracks [460, 1]. She testified that the man in the back of the car got up, leaned toward the gate-tender, and shot into the crowd [462].

"—He took hold of the seat this way [indicating]. And he had the gun, some firearms in his hand here [463] [indicating], and he fired into the crowd that was up here [indicating], and the body was,—it would be lower. Of course, the body was bending over, and it was protruding from the machine. . . .

Will you describe to the jury the personal appearance of that man that you saw leaning out?—He was a dark man, and his forehead, the hair seemed to be grown away from the temples, and it was blown back and he had clear features, rather clear features, and rather good looking, and he had a white complexion and a fairly thick-set man, I should say.

Have you seen that man since that time?—Yes, sir.

Where did you see him?—At the Brockton police station.

When was that?—About the early part of May.

Do you remember how long after the shooting it was that you saw him?—Well, about a month, not quite a month after the shooting. It seemed to be a couple of weeks.

Will you look around the court room and see if you see that man in the court room?—Yes, sir.

Will you point out to the jury where you see that man to-day?—The man on this side of the cage [indicating], on the inner side as you go out.

The man who is smiling?—Yes, sir.

That man you know is Sacco?—Yes, sir.

And are you sure that is the man?—Yes, sir." [464] . . .

On cross-examination she testified:

"[By Mr. Jeremiah McAnarney.] Have you tried to keep in your mind the picture of the man that you saw there at the shooting?—Well, I haven't been trying. It has just stayed there.

Now, you gave some attention to it. You saw him and you thought about how he looked in size and appearance, haven't you?—Yes.

To you, he looked like a rather tall man, didn't he?—Well, he looked like a fairly well built man.

I don't ask you how he was built. I ask you if he did not appear to you to be a tall man?—Well, of course, a person standing in an automobile coming along, I couldn't really get a—

Have you not said he appeared to you to be a tall man?—Well, fairly well.

Have you not stated before that he was a tall man?—Well, I do not know exactly whether I have or not. I think I made that statement before, but—

You made that statement under oath in the Quincy court, did you not?

—I think something along that line. I do not know just whether that is the word or not.

Well, you know, don't you?—You say——

MR. JEREMIAH McANARNEY. On page 48 of the record in the lower court.

[Continued.] And you testified a year ago. That is, one month after this shooting, one month after this all occurred, you testified in the Quincy court, didn't you?—Yes.

MR. JEREMIAH McANARNEY. I am reading from page 48 of the record.

[Reading:]

'Q. You say he was a man who seemed tall? A. He seemed as though he would be tall.

Q. Was he a large man, appeared like a pretty good built fellow to you?

A. He struck me like a fairly good sized man.

Q. Who, if he stood up, would be fairly tall? A. Yes.

Q. And built proportionately? A. Yes.'

That was your evidence in the lower court wasn't it?—I think so.

What?—Yes. [465] . . .

After you had been examined in the Quincy court, do you recall the last question that was asked of you, and I now give it, page 49.

'Q. Do you say positively that he is the man?' And your answer: A. 'I don't say positively.' Did you so state at Quincy?—Yes, sir. [466] . . .

Did you mean that at Quincy when you gave that answer?—Well, I do not know just how you want to put that, Mr. McAnarney.

I am not asking you to put it only as it was. When that question was asked of you, 'Do you say positively he is the man?' and when you answered, 'I don't say positively,' that is what you meant when you said that, isn't it?—Well, I had a reason in saying it that way. I do not just know how you mean it.

Didn't you mean that answer when you gave it?—I meant it in my own way.

Didn't you mean it in the way it was asked of you?—When you ask me to say yes or no——

What I asked you was:

'Q. Do you positively say he is the man?'

You heard that question given to you, didn't you?—Yes.

And to that question you then told the Court:

'A. I don't say positively.'

—I didn't want to commit myself." [467]

On redirect-examination the following transpired:

"When Mr. McAnarney now interrogated you in regard to that, I judge from what I heard you say you wished to make some explanation of that answer. I now ask you if you care to explain that answer, and if so, you may do so.—At the time there I had in my own mind that he was the man, but on account of the immensity of the crime and everything, I hated to say right out and out. I knew he was the man and still [476] I didn't want to

say knowing as I knew it would be a deliberate lie, according to my own mind, but still I hated to say right out and out, so I just put it that way.

That is the reason you answered as you did at that time?—I did.

MR. JEREMIAH McANARNEY. If your Honor please, I ask that that be stricken from the record.

THE COURT. I think I should grant the motion for this reason: it is what she had in mind in the court below; what she had in mind is not of any consequence here. If the cross-examination had referred to her testimony here, I think I should give her the right to make an explanation, but not with reference to her testimony in the court below. Therefore, I will order the answer stricken from the record. . . .

Miss Devlin, may I put this question to you: Have you at any time had any doubt of your identification of this man? [Objection of the defense was overruled.] [477]

THE WITNESS. No.

MR. WILLIAMS. That is all." [478]

Mr. McAnarney then directed the witnesses attention to her Quincy testimony about the size of the man:

"MR. McANARNEY. I will read the whole question and answer.

[Reading:]

'Q. Can you describe the man you saw doing the shooting? A. He was a man who seemed as though he was a big man to me. He had long black hair and his hair grew away from his temples at the side, and he had fairly clear features.'

The point I direct your attention to is that part of that answer wherein you say, 'seemed as though he was a big man to me.' You did so testify in Quincy one month after this shooting, didn't you?—Yes, sir. Well, Mr. McAnarney—

Pardon me. You have answered my question." [478]

An attempt by Mr. Williams to have the witness explain her Quincy testimony was blocked when the Court sustained Mr. McAnarney's objection. [479]

7. CARLOS E. GOODRIDGE, a Victrola salesman, said he had come out of a poolroom near the railroad crossing and had suddenly seen a man in the automobile point a gun at him: "I stepped down on the sidewalk, and it was coming towards me possibly at a rate of speed of ten or twelve miles an hour, I should say, approximately that. Just as I stepped out half way on the sidewalk, there was a fellow poked a gun over towards me, and I was probably within twenty feet of it, or twenty-five. I went back into the poolroom" [543].

The man, he stated, was leaning out of the car in front of the side curtains:

"How far did he lean over?—Well, I couldn't say exactly how far it was. He was in a stooping position.

Did you notice what he had in his hand, if anything?—He had a revolver.

What did it look like?—Well, I should judge a dark colored revolver, shining barrel to it.

Now, will you describe the car to the jury?—Well, when I came out after the car went by, I ran out again in the middle of the road to see if I could get the number of it. The car, before I got out into the road, was up beyond the bakery shop. I took it to be a Buick car from the back end of it. The car was all dusty, the curtains torn out in the back end, the window, and there was something sticking through it." [544]

He described the man and picked Sacco out as that man:

"Will you describe the appearance of that man to the jury?—Well, as I got him on a side view, he was a dark complexioned fellow, with dark hair, and he had his face—kind of a peculiar face, that came down pointed. [544]

Did you notice how his hair looked?—His hair was all blowing up.

Did he have any hat on?—He had no hat on.

Do you recall how he was dressed?—Not exactly. I think he had a dark suit on.

Have you seen that man since then?—Yes, sir.

Where did you see him since?—In this court room.

And when was that?—Last September or October.

Last what?—Last September or October, I couldn't say for sure.

Where in the court room did you see him?—I saw him when he was brought in here to be arraigned.

Did you see him arraigned?—Yes, sir.

Have you seen him since?—No, sir." [545]

On cross-examination he said he had seen Sacco when he came to Court in Quincy during the previous September (five months after the shooting) on some matter of his own. He was asked if he was not a defendant in a criminal case in the Court before which he was testifying:

"Are you not a defendant in a criminal case in this court?—No, sir.

MR. KATZMANN. One moment.

MR. MCANARNEY. If your Honor will suspend a minute until I make an investigation. If I may suspend cross-examination——

THE COURT. That is not a competent question.

MR. MCANARNEY. I think it would be if he was.

THE COURT. Oh, no. A man that has been convicted, then you can use that record——

MR. MCANARNEY. If your Honor please——

THE COURT. ——but not until. You don't mean, do you, before a man has had a trial, you are going to use that as evidence of guilt?

MR. MCANARNEY. If your Honor please, I think I would be entitled if the man is before the criminal side of this court and is now testifying on behalf of the Commonwealth, I would be entitled to show it.

THE COURT. I should exclude it.

MR. McANARNEY. Your Honor will save me an exception?

THE COURT. Certainly.

MR. MOORE. An exception for the defendant Sacco.

THE COURT. There is no difference between witnesses, whether they appear for the Commonwealth or for the defendant. The law is the same for all witnesses, and you can't attack any witness's credibility except by showing a record of conviction, and the record of conviction means a sentence, a judgment pronounced by the court." . . . [546]

The witness was cross-examined at some length about his description of the automobile as a Buick, and finally said:

"There might be a dozen things I can't explain to you, but in my own mind would convince me it was a Buick car." [555]

Goodridge admitted that the first time he was interviewed by the police he had not told them he could identify Sacco:

"When did you first talk with any official with reference to this case, connected with the prosecution of this case?—Well, not until some time I think, in November. [557]

That is the first time any official had talked with you?—Yes.

Well, you told them at that time you saw the man here in the dock, didn't you?—No, sir.

You didn't?—No, sir.

Not a word about that?—No, sir, not at that time." [558]

He had talked with detectives again in January and in February, 1921, but it did not appear when he had told them he could make an identification. [558]

At the end of the cross-examination a conference was held in the absence of the jury between counsel and the Judge. Mr. McAnarney called to the Judge's attention the fact that Goodridge had pleaded guilty in that court to a charge of larceny, that the case had been "filed" and Goodridge placed on probation. Mr. McAnarney asked to be allowed to repeat the questions already put and pursue the inquiry. The Court refused to permit this on the ground that the case had been "filed." The ruling was based upon the distinction between a conviction which was a judgment and a "filing" which was merely a suspension [2578]. The record does not show the exact discussion which then took place. The jury was accordingly not permitted to hear anything about the matter.

On appeal this ruling was criticized in defendants' brief on the ground that the purpose of the question was to show that the witness was testifying under a promise of leniency. The Supreme Judicial Court upheld the ruling since there was no judgment of conviction in existence against Goodridge and also because there was no evidence to show that the testimony of the witness was the result of a promise of leniency [4327].¹ This decision has been questioned in legal circles on the ground that the jury should have

¹ See text of opinion quoted on page 123.

been put in possession of all the facts and allowed to draw such inference of favor shown the witness and its effect upon his testimony as they thought proper.

Recently the Supreme Court of the United States, in an almost identical case (*Alford v. United States*, 282 U. S. 687, decided February 24th, 1931), reached a different result. On the trial of Alford for using the mails to defraud, testimony was given in support of the prosecution by a witness then in a Federal penitentiary. Defendant's attorney attempted to bring this fact to the knowledge of the jury. The precise question asked was, "Where do you live?", counsel stating, in the absence of the jury, that his purpose was "to show whatever bias or prejudice the witness might have." The trial court excluded the question because there was no proof that the witness had been convicted of a felony. The United States Circuit Court of Appeals affirmed the ruling on the ground that the attempt to discredit the witness bore no relation to the case on trial. It said, however, that a new trial would have been ordered, had counsel "sought to show that he was testifying under some promise of immunity." The Supreme Court of the United States unanimously reversed the conviction and decided that there had been an abuse of discretion by the trial court in blocking the inquiry of defendant's counsel into the proper setting of the witness. Justice Stone stated in his opinion:

"It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . .

"To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . .

"But counsel for the defense went further, and in the ensuing colloquy with the court urged, as an additional reason why the question should be allowed, not a substitute reason, as the court below assumed, that he was informed that the witness was then in court in custody of the federal authorities, and that that fact could be brought out on cross-examination to show whatever bias or prejudice the witness might have. The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution. . . .

"The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was abuse of discretion and prejudicial error."

Certain differences exist between the facts of this case and those in the Sacco-Vanzetti case. For one thing, the person who was being cross-examined was, in the Alford case, the most important witness for the prosecution, whereas Goodridge was but one of a number of identifying witnesses. In the Alford case the record clearly discloses the purpose of the cross-examination, whereas in the Sacco case the record does not give such discussion as may have taken place. It was argued in the brief on appeal in the Sacco case that the purpose for which the question had been asked was evident. It can hardly be doubted that that in the Sacco case, namely, "Are you not a defendant in a criminal case in this court?" was put for the purpose of showing possible bias on the part of the witness. There exists one other difference of no real importance. It is that in the Sacco case the witness was out on probation, whereas in the Alford case he was under detention. The essential elements of both cases remain, however, the same, even to the reason given by the trial court for the exclusion of the evidence—that there was no conviction of record against the witness. The Supreme Court of the United States and the Supreme Judicial Court of Massachusetts may thus be said to be in direct conflict on the extent to which a witness may be cross-examined as to possible bias.

In contradiction of Goodridge's identification the defense produced ARROGNI, a barber, who testified he had had a talk with Goodridge about a week after the shooting:

"I told him I was giving another man a hair cut when the bandit car went by the barber shop, but because I was turned my back to the door I did not see anything. Then he says to me, 'I was in the pool room and I heard some shots and I looked through the window and I saw the bandit car come up and I saw a man in the car but if I have got to say who the man was, I can't say.'" [1353]

He explained how he remembered the conversation:

"After I read in the paper what kind of testimony this Goodridge had made, it came in my mind what he told me the day in the barber shop." [1355]

PETER MAGAZU, who owned the poolroom in which Goodridge had been playing, testified that he had been playing pool with him at about two o'clock on the day of the shooting and had left him to attend a shoe customer in an adjoining shop which he was also running at that time. He said:

"While I showed the customer a pair of shoes, he comes right in and says, 'My God, something wrong about down the street.' I says, 'What?' He says, 'I think they kill the paymaster and get the payroll.' I says, 'Did you see the men?' He says, 'I seen the men, they pointed with a gun.' I says, 'How do the men look like?' He says, 'Young man with light hair, light complexion and wore an army shirt.' [1356]

Which man?—One man pointing with a gun. I don't know which.

Did he say anything further about it to you?—He says, 'This job wasn't pulled by any foreign people.'

Was that conversation he had with you in your shoe store?—In the shoe store.

What did you do?—We walk outside and see the automobile went by the corner." [1357]

In developing his cross-examination Mr. Katzmman was evidently trying to show that there could have been no such conversation as Magazu testified because Goodridge could not so early have known what had happened:

"Here is the question I have asked you several times. I am not sure you understand it. When you had the talk with Mr. Goodridge that you told Mr. Callahan about, had the automobile got up as far as your pool room at that time?—No, went by. It was already gone by the pool room.

Already gone by?—Yes.

Had it gone by the corner when you had that talk?—No.

Then Mr. Goodridge, I take it, must have told you something—— —Yes. —between the time it had gone by the pool room and before it got to the corner?—Before it got to the corner, yes.

And have you since learned that the shooting took place down in front of Rice & Hutchins?—Yes. We went down to see it.

Wait a minute. Have you since learned that?—No.

You haven't. Where did you learn it took place?—I understand it was in front of the shop.

Then let me ask you this: From the front sidewalk in front of the pool room—— —Yes. [1358]

——could you see, at the moment that Goodridge was talking with you, could you see anybody lying on the sidewalk down there?—No.

Could you see anybody lying in across the street at the restaurant?—Yes, could see some one.

You could see that?—Yes.

You could see right behind this fence (indicating), could you?—Yes.

And through the water tank?—Yes.

And could you see through this cobbler shop here, too?—Yes, that is right in the line.

You have pretty good eyes, haven't you?—Well, it is right in line. The cobbler shop is about 150 feet from my place.

Would you say that water tank was in line with where Berardelli's body lay?—It was on the other side of the street.

Parmenter's body was on which side?—I did not see the body. At the time I went there they took him in the house.

Well, had anybody come up to the pool room from way down here when the automobile was going around the corner?—I would not say it because when he claimed my attention I followed the automobile.

Did you see anybody come up and talk to Goodridge?—No.

And the conversation you say that you then had with Goodridge was that the paymaster had been killed?—Yes.

The money had been taken?—It is according to what he said.

And it was a light haired man who pointed a gun at him?—Yes.

And he thought they were Americans?—He did not mention Americans at all.

What was it he said?—He did not think the job was pulled by any foreign people.

When you came out of the pool room, when you came out of the shop, did you notice Goodridge out in the street in front of your pool room?—Yes. He went out with me." [1359]

Goodridge's employer, MANGANIO, had had a talk with him after the arrest of the defendants in which he had suggested that Goodridge go to see them in order to determine whether he could recognize one of them as the man in the car. Goodridge had refused to go on the ground that he had been so scared he could not recall the men's faces:

"—I see about the arrest of these, Sacco and Vanzetti, and I went over to South Braintree store and I told Mr. Goodridge that he should go and see if he could recognize these people, whether they were the ones or not.

What did he say?—Why, he said he could not do it.

Tell us fully what he said about it?—He said he could not do it because when he saw the gun he was so scared he run right in from where he was. He could not possibly remember the faces. I told him as a matter of justice, 'if you think you do remember the faces do go over there and I will pay you just the same.'" [1399]

Manganio also testified that Goodridge's reputation for veracity was bad. [1404]

On re-cross-examination he said:

"(By Mr. Katzmann) What does the word 'reputation' mean?—I beg your pardon?

What does the word 'reputation' mean?—Why, the word 'reputation' is the natural position a man enjoys among other people.

You mean by that, common speech of people?—I beg your pardon?

You mean by that, common speech of people?—Among all the people. Among all the people? Have you heard Mr. Goodridge's reputation for truth and veracity?—Yes.

—discussed?—Yes.

When, first?—When? After he ran away from my employment.

You mean, you discussed it?—I discussed it with the people that he deals with.

You are giving, are you not, your personal opinion of his reputation?—No, I am giving what I obtained from my investigation after he ran away from me.

How many times did you discuss it with people?—I beg your pardon?

How many times did you discuss it with people?—Oh, that probably hundreds of times.

Since when?—Since he went away.

When was that?—The 22nd of May, 1920." [1404]

DAMATO, another barber, who himself had seen the escaping car go by, testified that he had had several talks with Goodridge and that Goodridge had said he had seen no one in the car:

"that he was in the pool room and he did not see anybody in the automobile and if he was outside he could have seen them" [1490]

After the trial Mr. Moore obtained voluminous affidavits showing that Goodridge had testified under a false name, that he had been convicted in New York in 1892 and in 1908 for stealing watches and money and had fled in 1911 from an indictment for a similar offense, that his reputation was bad and that he had expressed hatred towards Italians.¹

When Mr. Moore learned all these things about Goodridge he went to see him in Maine, in the summer of 1922 taking along a stenographer and a deputy sheriff. He induced Goodridge to come into his automobile and there interviewed him. The transcript of that interview, submitted by Moore on one of the motions for a new trial shows that he attempted to find out from Goodridge what inducements had been offered him by the prosecution for his identification testimony. When Goodridge insisted there had been none, Moore had the deputy sheriff take him to Augusta, Maine, on the charge of larceny still outstanding in New York. On this occasion Goodridge admitted most of the things with which Moore taxed him, the changes of name, the prior convictions, the flight from the third indictment:

"You have never served under this last and pending indictment?—No, sir. Hoped I never would, but (smiling) guess I will alright. I know how this come out. It was a woman. [3874]

Moore questioned the man at length about how he had come to identify Sacco:

"What reasons did you have for making no statement for six months or nine months, then suddenly after this lapse of time, made a statement? Why the change? You tell me now that from along the latter part of August or early September, until the winter months of 1920 and 21, you had falsified, avoided, and evaded, making no statement what[3879]ever to Stewart, to Brouillard, or any other representative of the attorney's office.—Yes.

Then you tell me that along in July you decided to make a statement that you did make.—There was no quick move about it. . . .

The first time you have made any identification to anybody was when you talked to Williams in July?—Oh, No. The first identification I made was to a woman. When Sacco's picture came out in the paper, I took it out to a girl named Lottie Packard.

You knew Lottie?—I used to know her. She was in the store quite a lot.

You told her that you identified him?—I says to Lottie, 'Whose picture is that?' and she called him by name. I had the paper folded so that she couldn't see nothing but the picture. 'I used to work with him in a factory.'

¹ See pp. 115, 116, for discussion of Judge Thayer's decision denying this motion.

I says, 'That's the fellow that was in the gang down here.' I told Lottie never to say anything about it. I never told anybody but my wife.

Who do you mean 'wife'?—My present wife up here. [3880] . . .

You claim to have told her that?—Yes, only once I guess.

Did you tell Scott?—No.

Did you tell Brouillard?—No.

Did you tell Stewart?—No.

You didn't tell any of the district attorney's office?—No.

None of the police investigators?—No.

Kept your mouth shut except to Lottie and your wife until you talked with Williams in July 1921. Yes. . . .

Did you tell Williams you wouldn't tell him anything?—I told him he might as well let me go home.

Your knowledge of trial cases makes you know that no lawyer is going to put a man on the stand under those conditions.—That is how he put me on.

You don't want me to think— You said you wanted to pay your price. I found you tonight engaged in singing hallelujahs in divine worship. You are either a man who is 100% consistent or else you are something else. Talk to me on a white man's basis. Now start to put something over that is logical.—No, I'm telling you—

My name is Moore.—I knew it—a lawyer. Glad to meet you. I've heard of you from San Francisco to Maine. (Shakes hands.)

You're either a consistent man or an inconsistent one. You certainly didn't go that day for five minutes before the witness stand and leave Williams in uncertainty.—Couldn't you told that, as a lawyer, when he began to talk? Couldn't you tell it?

No, I couldn't—Well, MacKay and Erny could.

The point is that no man is going to put a man on with total uncertainty as to what he is going to testify. From what you have told me of your past life, you have been, to say the least, loose with reference to the truth. You tell me that you evaded and lied and did everything else for a period of six or nine months with these fellows. What was the reason for your evading and lying for nine months?—I didn't want anything to do with the case. I am going to give you something straight. I don't know whether you will believe it or not. I am afraid of an Italian.

The facts are you got cut up some in Buffalo.—Yes, I got cut bad.

You have a very intense hatred for them?—No, not exactly, I don't have hatred for anybody. [3881] . . .

What was the character of the argument that smoked you out of nine months of silence. A man must have some peculiar power that can smoke you out.—I don't know, exactly.

You want to see something tangible when you deliver?—Yes, on some things.

What did he deliver or promise to deliver?—Nothing.

What did he deliver?—He didn't deliver anything as I know of.

What did he tell you that prompted you to come out?—Why I don't know.

There was so darned many talked to me. Williams went into the District Attorney's office and come out, and the next thing I knew I heard my name called from the court room.

Williams examined you?—Yes.

You haven't any explanation to give to me of why you didn't tell.—Yes. They said they had some pictures and when I looked them over I said I had nothing to say about the case.

Why did he continue with you?—That is what I don't know.

Why didn't you tell him you didn't care to see him any more. You were a free man. There was nothing binding was there?—No, nothing binding as I know of.

Then why did you play along?—I didn't play along. I didn't chase them.

Why didn't you tell Scott?—The only fellow I have said anything to was Manganaro. He said it was best to keep still. [3882] . . .

When this man was brought into court and arraigned at the same time you were arraigned, did you tell MacKay that he was the fellow that you had identified?—No. I kept shut.

You had already been interviewed, previously to Sept.?—No. Just once.

You were interviewed a good many times afterward and you [3883] never told any of the people who interviewed you, and never told them you identified the photograph in the newspaper?—No.

Is your feeling toward Italians one of hatred or fear?—I have no hatred. I have fear.

What did Williams do that removed the fear?—It was fear that kept my mouth shut. I would rather have done anything. . . .

I don't want to argue. I am not here to persuade you to say anything. As you have respect for God, are you honestly and firmly convinced that you testified the truth?—I will tell you. I think I testified to the truth to the best of my ability, and it's a pretty hard proposition.

I am asking you, is your conscience clear?—Sometimes I don't think it is.

Do you mean that your conscience—— —Sometimes I have sat and thought of it a good many times.

Mrs. Lee is Deputy Sheriff of this county. It so happens that she is here to-night with full knowledge of all these facts. I want you to tell her whether or not you believe that your testimony was the truth, and whether or not you think that a man's life ought to be taken on that testimony?—I don't think anybody ought to take life.

That is an abstract problem. The law demands that human life be taken if a man is guilty. Can you conscientiously say that, between yourself and your God, that this particular man should die on your statement?—No, I should not think he ought to. No, he should not die on my statement. . . . But afterwards [3884] a good many times since, I have thought that I am not positive. I am not positive that if I would have to swear that that man was the one, I could positively identify him as the man.

Why did you tell the jury?—I thought I was so sure of it. No influence was ever hinted at by any one of them. It was straight conscientious business.

They never mentioned any inducement to me.

Then why?—I thought I was positive.

What makes you uncertain since?—My conscience I guess. I have thought many, many times.

Do you feel so in doubt in this matter that you are willing to state under oath that you cannot be certain and that you are not positive.—Well, I don't think I could do you any good anyway. . . .

Are you willing to go down and lay the cards on the table? You know darn well you had doubts and uncertainties for nine months, either that or you were driving a bargain.—No, I never drove no bargain.

I will say that a district attorney—it wasn't up to you—it was Williams that convinced you that you should identify. Williams argued, begged and fought with you to identify.—You know just how those things is yourself." [3885]

8. *Summary*

Before the Lowell Committee testimony was given by GALLIVAN, former Chief of Police of South Braintree, expressing astonishment at finding witnesses more positive at the trial than they had been the year before at the preliminary hearing at Quincy:

"Was there anything that took place at that trial that surprised you or excited your surprise, anything that took place at that trial?—No, sir. The only thing that took place there that excited my surprise was where all the witnesses were coming from. This is my own private opinion, I don't know whether I have ever expressed it before or not, but it did seem to me that it was dog eat dog there, one crowd would get a big crowd there, and then the other crowd tried to offset them, that's the way it appeared to me. The Government would put on a witness there and then the defense would rush in to offset it, and I guess Katzmann was just as wise, he would dig up one to offset that other one, and then the defense would dig up one to offset him. I may have made that remark before but I do not think I have, but there at the time that's the way the case appeared to me to be drifting along, to strive to see who could get the biggest crowd. In other words to see who could tell the biggest lies.

Did it appear to you that both sides were trying to see who could tell the biggest lies?—That's the way it must have appeared, it must have; that's the only way it could be. I know just what you are coming at now.

You know more than I do, then.—I know just what you are coming at and it's this: That in the Quincy Court he was not identified positively.

Is that so?—To the best of my knowledge.

PRESIDENT LOWELL. [Addressing the witness.] Were you there?

THE WITNESS. I was there when that question was asked of Miss Splaine, Louis Wade, Miss Devlin, if I remember right. George Adams [5178] represented the District Attorney's office at that time, and they were asked positively to swear under oath, and as strong as they would go would be

this, 'He looks like him,' that's as strong as they would go, but that was not strong enough to suit George, the District Attorney, and he said to a number of them, 'Will you swear under oath they were the men you saw that day?' " [5179]

Of the eleven witnesses for the prosecution who made definite identifications not one claimed to have seen both defendants. Of the seven witnesses who appeared against Sacco not one was at all times unequivocally certain of his or her identification. Although Mrs. Andrews, Miss Splaine and Miss Devlin were very sure of their testimony at the trial the last two had expressed doubt at the preliminary hearing and, prior to the trial, Mrs. Andrews had told an investigator for the defense that she could not identify. Pelser had done the same and had even told the police so. Both these witnesses made retractions after the trial which they later withdrew. According to a number of defense witnesses Mrs. Andrews, and also Goodridge, had said they could not identify. After the trial Goodridge himself expressed doubt. At the trial Heron said he was "pretty sure" and Tracy refused to be positive.

Only Miss Splaine and Miss Devlin saw the defendants immediately after the arrest, and Miss Splaine had earlier picked out a number of persons as resembling the man she had seen. These two young women, from the window of a building some seventy feet to the side of the crossing and two stories above the street, had had only a brief glimpse of a man leaning out from a moving automobile. Heron made his identification in the latter part of May. He did not account for not having come forward sooner nor for his presence on the occasion when he saw Sacco outside the Quincy Courthouse. His refusal to speak with the investigator for the defense and the contradictory reasons he gave for this refusal at the trial cast doubt, moreover, on his identification of a man casually seen for a few minutes in a railroad station.

All the other witnesses made their identification very late: Tracy and Mrs. Andrews who, like Heron, had observed the man they claimed to be Sacco under circumstances not connected with the shooting at all, were not taken to see Sacco until February, 1921, eight months after the crime. The reason for this delay was not explained. Goodridge, who saw Sacco in September, 1920, and made no identification when interviewed by the police in November, gave no explanation at the trial as to when he did first conclude to identify, but he claimed later that he had done so when he saw Sacco's picture in the paper. Pelser, after having told both sides he could not identify, changed his position when, during the trial, he saw Sacco.

Practically no attempt was ever made to check prospective identifications by having the suspects placed in lineups from which selection would have to be made.

c. Prosecution Witnesses Who Did Not Identify

Some of the witnesses, Mrs. Nichols and Colbert, for example, saw some of the shooting but did not see the faces of the men. Others—Behrsin,

Bostock, Wade, McGlone, Langlois, Carrigan and DeBeradinis—were unable to identify, although they saw the faces of the bandits.

1. HANS BEHR SIN, chauffeur for Mr. Slater, one of the owners of the shoe factory, filled his tank at the gasoline pump in front of the factory at about three o'clock on April 15th, and then drove along Pearl Street toward the railroad. As he went he noticed two men sitting on the fence near the factory of Rice & Hutchins. He described these men:

"Can you tell us how they were dressed or how they looked?—The one was dressed with an army shirt on him, I would call it, the color of an army shirt on, and I did not notice exactly what the other was.

One had an army shirt on?—Yes, one had an army shirt on.

Did you notice what they had on their heads?—They had—I wouldn't say for sure, but they had something on their heads, anyway. I think it was caps, but wouldn't say for sure. [326]

Could you tell what they looked like? That is, what the description of their face and hair was?—Well, I could not tell about their hair very well. They were all covered up.

Could you tell about their complexion?—Both of them seemed to be pretty well light complexioned fellows.

What?—Kind of light complexioned boys.

Did you notice their features?—No, not very well." [327]

He heard shots as he reached the crossing, stopped his car and saw coming along another car from which people were shooting:

"The car was a good big sized car. I should say it was a Buick car, as far as I have seen cars, and they were some of them sitting in the front there. It wasn't going very fast I do not think the car was in good order anyway. When they passed by, as far as I can say, the back curtains were down and flopping around back and forth, and I think there were about five of them in there in that, as far as I can say, and as that passed me by there was some one in the back there beckoning with a gun or shotgun, whatever it was, through the back light where you got the celluloid glass, whatever it is. That was broken out." [328]

Behrsin had not noticed the faces of the men very well and could not identify them, he said [329]. He was, however, not asked anything directly about the defendants.

2. JAMES F. BOSTOCK, a mill-wright who looked after the machinery in the shoe factories, testified that he left the Slater & Morrill factory at about three o'clock to catch a trolley. He watched the Slater car being filled with gasoline [186] and then stopped at the excavation for a few minutes. As he left, going toward the railroad crossing, he noticed two men leaning against

the fence near a telegraph pole. He also passed Parmenter and Berardelli on their way to the factory:

"I saw Parmenter and Berardelli coming down the street and as I walked towards them Parmenter says to me, 'Bostock, when you go up by, you go into the other factory and fix the pulley on the motor,' and I says to him, 'I am going to get this quarter past three car to Brockton to do a repair job,' and as I started to turn around to leave, I heard two or three shots fired, and as I swung around there were two men shooting at him." [187]

Bostock, turning around at a distance of about fifty feet, saw the shooting. He said that the bandits were the men he had seen leaning against the fence. He described them:

"Will you now describe, so far as you can, the appearance of the men who were doing the shooting?—Why, there was two dressed in—— The two that was doing the shooting was dressed in sort of dark clothes, with caps, dark caps. I should say they was fellows of medium build, fellows not quite so heavy as I am.

Can you tell us anything further about their appearance?—Why, they appeared to be foreigners.

Can you tell us what nationality?—Well, I should call them Italians.

Notice anything about how their faces looked?—Why, I told you they resembled, to me—— I have seen Italian fruit peddlers, and as I saw them as I passed them I thought they was Italian fruit peddlers. That is what I thought they was as I passed them. [194]

Can you tell us anything more definitely how their features looked to you?—They was smooth face, dark complected. One I should call swarthy, dark complected." [195]

Bostock said he had seen one of these men fire four or five times at Berardelli while standing guard over him [189] and the other fire several times at Parmenter [191].¹ As this fellow stood looking down the road and beckoning, an automobile came along [189]. A third bandit got out of the car to help the other two with the money boxes; the three, with the boxes, then went back to the car [190]. Bostock had started toward the affray meanwhile; but he was headed off by shots. He thereupon continued on his way toward the railroad crossing [189]. The moving car passed him as he neared the water tank. He said: "If I laid out at arm's length I could have touched the spokes of the car as it passed me" [191]. He noticed that the car was a Buick, that the back glass was broken and the side curtain flapping. He observed four men in it, one of these, whom he could not describe, firing from the side of the car [191, 192, 195]. After the machine had passed him he retraced his steps and went to the assistance of the victims. [192]

Asked whether he had seen the bandits again, he said: "I don't know as I have seen any of the men implicated in the shooting, no sir.

Have you been able to identify any of those men?—No, sir."

Bostock had been taken to see the defendants after their arrest; and was

¹ See pp. 337 to 341.

asked whether he could tell if they were any of the men. He answered: "No, sir. I could not tell whether or not they was, no, sir" [195]. He was asked nothing about this on cross-examination.

3. LEWIS L. WADE, a shoemaker employed by Slater and Morrill, who had been helping Behrsin fill the Slater car at the tank in front of the factory, saw the shooting. He said that one of the bandits had shot twice at Berardelli:

"As I turned there and looked up the road, I saw Parmenter run, and as he ran across the road he ran like that (illustrating), and there was a dirt truck— The horses were out over the gutter and the truck was on the sidewalk—and as he ran by it, I couldn't see him no more. I looked at Berardelli, and he was in a crouching position. That means his left arm was up here, and he was down like that. And this man was standing, well, not at the most over five feet, anyway, from him, and he was in a crouching position. He was over like that, jumping back and forth, and I saw him shoot. Then I saw him shoot again.

In what direction?—Towards the man on the sidewalk, Berardelli. That would be, shooting south. Berardelli stood in an angle of north-east, and the man that was shooting him was facing south. And the next thing that I saw was a car came up Pearl Street, and stop— Well, it didn't exactly stop. I wouldn't say for sure whether it stopped or not. And there was a man at the wheel. As I looked at the man, he was a pale-faced man, a man, I should judge—I am not very good at ages, but I should think he was about probably 30 or 35. He looked to me like a man that had sickness or he was sick. There was another shot fired, and he put her in full speed and went up the hill, and this man that was shooting Berardelli went out on the side of the road and picked up the money box, I call it, and lifted it up with two hands and put it into the car, and he got into the car, and I don't know whether he shot—I would not say for sure whether he shot again or not, but I think so, and I should take it that he shot at the man on the road. Then I turned into the office to call emergency, and after I called them I ran out. I went to where Berardelli lay, and he was not dead then. He was breathing, and when he breathed the blood would come up and down on his face. We thought he was shot in the mouth at that time." [203]

He described the man thus:

"He was kind of a short man, had black hair, he was bareheaded, he had black hair, and I would say that he weighed probably 140 pounds. . . . He had a gray shirt on. His hair was blowed back. The wind was blowing pretty hard that day, and his hair was blowed back. And he needed a shave, and his hair was cut what you call a 'feather edge' in back." [204]

The witness testified that at the Brockton police station, about a month after the shooting, he thought he saw the man again. Wade would not identify Sacco as he:

"And will you tell the jury if the man you saw in the Brockton police station, which you say in your judgment was the man who did the shooting that day, is in the court room?—I would not say for sure.

What is your best judgment?—Well, he resembles,—looks somewhat. . . .

Is he, in your best judgment, the man you saw shooting at Berardelli that day?

MR. McANARNEY. I object. [205] . . .

MR. MOORE. Will you save my exception?

THE COURT. Wouldn't it be better if you waited with your exception until the Court ruled? You may ask him what is his best judgment as to whether the man whom he has called Sacco is the man whom he saw on the day of the alleged shooting. I will save an exception, if you desire, to that question. . . .

—Well, I ain't sure. I have a little doubt.

What is your best judgment, is the question, Mr. Wade.

THE COURT. Pay attention, Mr. Witness, to the question.

THE WITNESS. My best judgment—I don't understand.

THE COURT. What is your best recollection, if you have any; what is your best judgment?

Well, my best judgment is this: If I have a doubt, I don't think he is the man." [206]

Mr. Katzmann then asked the witness what he meant by his last answer and he said:

"Well, the reason why I had a doubt, I have seen a man that resembled him, the man that I saw that day, and that is the reason why I have a little doubt." [207]

The District Attorney was permitted to show that Wade had identified Sacco at the Brockton Police Court and that he had later expressed doubt about the identification at the Quincy hearing:

"THE COURT. (To the Jury.) Gentlemen, I should explain to you the purpose of this inquiry. This is not in any way evidence of the fact. Under the statute, although the prosecution calls a witness, if a witness has made contradictory statements outside, inquiries may be made with reference to those statements, solely with one view, and that is, to attack the credibility of the witness. It is not affirmative evidence of anything; it simply attacks the credibility of a witness, and as far as it can go against [207] the defendant, given its fullest extent, would be to absolutely discredit the testimony of the witness.

Did I ask you at that time if, in your judgment, Sacco was the man you saw shooting at Berardelli?—I don't remember that.

Well, did I?—No, sir.

You say no. Did I ask you any questions about Sacco?—No, sir.

What?—Not that I remember.

Do you now tell me and tell the jury I did not ask you those questions in

that ante-room by the District Attorney's room?—I don't remember, Mr. Williams, that you asked me that.

Did I have any talk with you?—Yes, sir.

And I said nothing and put no questions to you regarding Sacco?—You talked about the case to me.

You remember that, do you?—Yes, sir.

You say you changed your judgment about four weeks ago?—Yes, sir.

Up to that time had you had any question in your mind?—Well, before that time?

Yes.—Well, I thought I was a little mite mistaken.

You thought you were a little mite mistaken?—Yes.

When did you first think you were a little mite mistaken?—Well, when I went down to the Quincy court.

Down to the Quincy court. Was Mr. Katzmman present in the Brockton Police Court when you appeared there?—Brockton police station, yes, sir.

Did he ask you at that time if Sacco was the man who did the shooting?—Yes, sir.

What did you tell him?—I told him yes.

Did you have any doubt in your mind at that time?—Well, no, not then, I don't think I did. [208] . . .

Will you now say I did not ask you if the defendant Sacco was not the man who shot Berardelli?—I don't remember you asked that question.

Will you say I did not ask you?—No, I won't.

I did ask you, didn't I?—I don't remember whether you did or not, to tell you the truth.

I asked you more than once, didn't I?—I don't remember that, Mr. Williams.

You don't remember?—No, sir.

And you want to let it go that way, that you don't remember me asking you that?—I don't remember you asking me that question." [209]

On cross-examination Wade testified he had said on his direct-examination that he was not sure it was Sacco, because a short time before the trial he had seen in a barber shop a man resembling the one who had shot at Berardelli:

"It was a Saturday afternoon. It was about quarter past 1 or 1 o'clock, and I went in to get a hair cut, and there was about six ahead of me, and this man came in. There was a chair right side of the stove and he sat down on it, probably about four or five feet from me. As he came in he took his hat off and his coat and he sat down in the chair and I looked at him and I wondered where I had seen him before, but I could not place him, and when I went home at night I spoke to my wife about it, and the more I looked at that man at that time, he had the same resemblance as the man I saw shoot Berardelli." [216]

He said that on May 26th, 1920, in the Quincy Court, he had expressed doubt about his identification of Sacco and had testified:

“‘Q. You were not able at that time at the Brockton police station to positively identify this man? A. I had a little doubt.’

You so testified at Quincy, didn’t you?—If I remember,—it is so long ago, I may have said that.

If you said it then,—and, Mr. Katzmann, I am reading from the official transcript—if you said it then it was true, wasn’t it?—If I said it, it must have been.

MR. JEREMIAH McANARNEY. Take page 31, Mr. Katzmann, the fourth question from the top.

‘Q. Do you say this is the man or can you say positively whether he is or not? A. I do not want to make a mistake. This is too damn serious, but he looks like the man.’

Does that call your attention to the question and your answer?—Yes, I remember that.

Now, did you later down have this question put to you:

‘Q. Will you say he is the man?’ and you answered, ‘No, I will not say so?’

You so answered at Quincy last May, a year ago, didn’t you?—I do not know, it is so long ago.” [216]

In 1926 Wade picked a picture of Joe Morelli as strikingly like that of the man he had seen shooting Berardelli, saying that it also resembled Sacco. [4469]

4. JAMES E. McGLONE, who was working at the excavation across the street from the shoe factories said he had seen a man grappling with Berardelli and another bandit near him. He could not describe either of them, except that they were dark and looked like Italians [267, 268]. On cross-examination he testified that neither of the defendants was one of the men he had seen [274].

He finally testified:

Redirect-Examination

“ [By Mr. Williams.] Can you say whether or not they are the same men?—No, sir, I could not say if they were or they are not. . . .

Recross-Examination

[By Mr. Jeremiah McAnarney.] The reason you say that you are unable to identify these men, is it not because you cannot see in their faces the men you saw there on the street? That is the reason, isn’t it?—Well, yes.

Redirect-Examination

[By Mr. Williams.] Any other reason?—Well, I can’t say that they are the men or they are not the men, because I ain’t sure.

MR. JEREMIAH McANARNEY. I ask that last be struck out as not responsive.

THE COURT. That may be stricken out. . . .

Have you such a picture of those men you saw on the street that day in your mind that you can say whether or not these or anybody else is the man?—No, sir, I did not get a good look at them to see.

MR. JEREMIAH MCANARNEY. I objected before he answered. . . .

THE COURT. 'No, sir,' is responsive. Everything else may be stricken out. [276]

Recross-Examination

[By Mr. McAnarney.] Mr. Witness, the reason you say you cannot identify these men is because their faces do not bring back to you the face of the man or the faces of the men you saw there that day, do they?—Well, I did not get a good look at them to see what they did look like. I can't say they are the men. I can't say they ain't the men.

You looked at those faces, didn't you?—I just got a light glimpse of their face.

You saw their faces, didn't you?—Not enough to identify them.

You were close enough so you saw the side, and you noticed the side of the revolver was flat, didn't you?—That was facing right straight towards me.

The man that is holding the revolver was facing towards you then, wasn't he?—Now, he was this way [indicating].

I understood you to say the revolver was facing towards you.—When a man has a revolver in his hand, that way, you can see it. If a man is standing in front of you holding a revolver and you are standing that side, you can see the revolver. I only got a glimpse of one side of his face. I could not identify him." [277]

5. EDGAR C. LANGLOIS, foreman for Rice & Hutchins, opened a window in the factory when he heard the shooting and saw two men firing at Berardelli. He saw one man also fire back at him again from the automobile as it passed to the crossing [279, 280].

He described the bandits:

"Will you describe to the jury what you observed as to the appearance of either or both of these men with guns that were down below your window?—Short and dark complexioned, curly or wavy hair, about five feet, eight or nine inches, about 140 or 145 pounds.

Anything else?—No, sir.

Could you tell about their age?—25 or 26, young men.

What?—Young men.

Anything else you noticed about them?—I do not remember.

Could you tell how their hair was brushed, if it was brushed or in what form it was worn?—Combed backward, if I remember right.

What?—Combed backwards, if I remember right.

Did either of them have anything on their head?—I do not remember.

“‘Q. You were not able at that time at the Brockton police station to positively identify this man? A. I had a little doubt.’

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Could you tell how their hair was brushed, if it was brushed or in what form it was worn?—Combed backward, if I remember right.

What?—Combed backwards, if I remember right.

Did either of them have anything on their head?—I do not remember.

Did you see their hair?—I did.

Do you remember anything about their physique, their physical appearance, outside of what you just said?—Stout.

What do you mean by 'stout'?—Well, I would say thick-chested.

What?—Full-chested, that is all I know.

Do you know how they were dressed?—No, sir, I do not remember.

Could you identify either or both of those men if you saw them again?—No, sir.

Are you sure of that?—Yes, sir." [284]

On cross-examination Langlois testified that when he saw the defendants at Brockton station he stated that Vanzetti was not like either of the men he had seen before and he was also unable to identify Sacco. [288]

6. MARK EDWARD CARRIGAN, a cutter for Slater & Morrill, testified that he had seen the car coming over the crossing but had been unable to recognize any one in it because it had been going so fast [175]. He said he had seen a man with a gun who was dark and looked like a foreigner, "and he had black hair. It was kind of long. It looked as though it was combed back, but the wind had blown it. . . . He looked, possibly, like an Italian" [176].

On cross-examination he stated he had been unable to identify the defendants when taken to see them upon their arrest and had so told the police [178].

7. LOUIS DE BERADINIS, from his cobbler shop at the corner of Railroad Avenue and Pearl Street, saw the car going over the track and noticed only one man who was leaning outside it and pointing a revolver at him. With him at the time was a salesman for E. C. Hall. This man was not called as a witness at the trial, although he had testified at the inquest held a few days after the crime.¹

De Beradinis described what he had seen:

"Now, will you show the jury just how that man stood or sat or leaned out, or whatever he did?—We will say this is the seat. The driver was over there on the other side, and this man pointed a revolver to my face and was turned this way, and he holds himself on the other hand, and the other hand pointed a revolver at my face.

Will you describe that man to the jury, how he looked to you?—Well, the man I saw he had a long face. That is what I said in the Brockton police station, it was a long face, and awful white, and light hair combed in the back. It was a thin fellow I saw.

What?—Light weight.

Do you know what nationality he was?—I can't say. The revolver scared me enough.

Now, have you seen that man since, that you saw that day?—No, sir.

¹ See p. 327.

Have you seen anybody that looked like him?—No, sir.

Now, just a minute. Were you taken down to the Brockton police court?

—Yes, sir.

Did you see anybody there?—Yes, sir. [482]

How did that man that you saw there compare with the man that you saw that day on Pearl Street?—There is a lot of difference.

What?—There is a lot of difference between the one I saw on Pearl Street and the one I seen at Brockton.

Well, is that what you said at that time?—Yes, sir.

Didn't you tell me in my office that the man you saw in the Brockton police station looked like the man you saw on Pearl Street?—No. . . .

You went down to the Brockton police station?—Yes, sir.

And did you see the defendant Sacco there?—Yes, sir.

Did you then say, referring to the defendant Sacco, 'I have an idea that is the one that pointed the revolver at me?'

—You didn't say it that way. [483] . . .

First,—I will repeat both answers I read to you. First, 'I have an idea that is the one that pointed the revolver at me,' and then, secondly, after you say you took another look, 'I am not sure that is the man. It looks to me, but I am not going to say for sure. I think it is, but am not sure.'—I didn't say that way.

Now, you say you didn't say either of those things?—I did say, but I didn't say so the way you read there.

Now, will you tell the jury what you did say?

MR. MCANARNEY. Pardon me. May I inquire if the district attorney intends to abandon the witness?

MR. WILLIAMS. Abandon him to whom?

THE COURT. What do you mean by 'abandon the witness'?

MR. MCANARNEY. That is a familiar term of legal phraseology, that if he sees fit to abandon the witness, he may cross-examine him as to time and place that he made different statements, but not if he does not. [484]

THE COURT. I understand that as to the time and place and occasion, and when they are through with this witness I will adopt my usual course of explaining the relevancy of this testimony.

MR. MCANARNEY. I didn't want to be getting up to each question and objecting. If it is all now going in subject to that rule, then I won't rise and object to each question.

THE COURT. It is going in under that rule, and, as I say, it is not binding at all against either of these defendants. At common law you could not attack the credibility of your own witness by showing that that witness has made different statements on other occasions and at other times, but, under a Massachusetts statute, that is allowed and, as far as it can go, gentlemen, if it is gone to any extent it is simply to attack the credibility of this witness by showing that he has made other statements inconsistent with statements that he has made on the witness stand. It goes to his credibility, and nothing else. It has no binding effect upon the defendants in any manner whatsoever.

ever. . . .

MR. McANARNEY. I understand before he may do that that he must first declare his position that he does abandon the witness. I don't understand that he has so said yet.

THE COURT. I am not going to ask him if he abandons the witness, or not.

MR. McANARNEY. Your Honor will kindly save me an exception.

THE COURT. All right. I will let you put that question.

MR. MOORE. And your Honor will save me an exception.

Do you wish to say what was the language you used?—Somebody asked how he looked to me. Then I told that the one I saw, the bandit on Pearl Street, was light, long faced fellow. That is what I say in Brockton, and he had long hair, and light. Then he asked me if I saw Sacco. I said, 'No I can't say sure I saw Sacco. The one I saw was light, and Sacco was dark.' That is what I told them in Brockton.

Didn't you tell me in my office, no later than this morning, Mr. Witness, that the man you saw in the Brockton police court looked like the man you saw on Pearl Street on the day of the shooting, though you could not be sure?—No, Mr. Williams; you are wrong [485]. . . .

Didn't you tell me each time I had that talk with you, sir, that the man you saw on Pearl Street that day looked like the defendant Sacco, though you could not be sure?—Sure. I did say, sure, I told you. [486]

THE COURT. There is so much commotion in the court room, I can't hear counsel for the defendant.

MR. McANARNEY. I simply object to the question and answer.

THE COURT. I will allow it simply and solely for the purpose of attacking the credibility of the witness by showing that he has made inconsistent statements with his present testimony. It is not binding, neither is it competent as affirmative evidence against either of the defendants. As far as it can go, it is to throw out the entire testimony of this witness on the ground that you do not believe him or he has made other statements contradictory to what he has stated here in court. . . .

And what you have now said you told me is the truth, is it not?

MR. McANARNEY. I want to object to that before he says anything.

THE COURT. What is the question? Haven't you gone about as far as you should go in contradicting your own witness?

MR. WILLIAMS. Perhaps so.

MR. KATZMANN. He is asking now whether or not that is the fact, so as to leave it affirmative testimony, if it is.

THE COURT. Not because he has said at other times, or made at other times, contradictory statements?

MR. KATZMANN. No. Mr. Williams—

THE COURT. I am going to allow him to ask the witness, if he desires now, the question whether or not he is sure, to put it exactly in the form of the question that you put a little while ago.

Well, do you now say that the man you saw on Pearl Street that day, who shot at you, looked like the defendant Sacco?—Yes, sir, as I say.

Cross-Examination

[By Mr. McAnarney.] Well, the man that pointed the revolver at you had light hair, didn't he?—Yes, sir.

You don't mean that Sacco has light hair, do you?—No; Sacco is dark.

You are sure that it was a light-haired, thin man who pointed the revolver at you?—Yes, sir, sure." [487]

8. Summary

All of these seven witnesses had good opportunities for observation. Three of them, Behrsin, McGlone and Carrigan, however, did not get more than a glimpse of the faces of the bandits. Two, Wade and De-Beradinis, found resemblance between Sacco and one of the bandits, but the latter witness was sure that Sacco was not the man he had seen. Bostock, who saw the bandits at close range, was unable to say whether either of the defendants was one of the men. Langlois was sure that Vanzetti was not one of the men and he had been unable to identify Sacco. These witnesses confirm the fact that Vanzetti was not directly concerned in the shooting and that there was a resemblance of some kind between Sacco and one of the bandits.

d. The Witnesses for the Defendants

These witnesses will be discussed, as were those for the prosecution, in the order of the events they describe.

1. MRS. JULIA CAMPBELL, as has already been noted,¹ under cross-examination stated positively that neither defendant was the man whom she and Mrs. Andrews had seen under an automobile in front of the shoe factory around noon. [1331]

2. MRS. JENNIE NOVELLI, a trained nurse, testified that at about ten minutes before three she saw a car moving slowly along Pearl Street going from the Square toward the crossing and that she noticed in it the man next the driver, whom she thought she recognized as William Mooney, a friend of hers [1222, 1239]. She stated that this man was not Sacco. Mrs. Novelli said she had been shown photographs of the defendants by Officer Scott and had told him what her opinion was of their resemblance to the man she had seen. [1226]

On cross-examination she said she had been wearing glasses for the three weeks preceding her appearance in court because of headaches and that her doctor had said: "I was very good at far sight" [1229]. She said she had talked once with a man she had thought was Officer Scott, but when Scott had stood up in Court on the previous day she had not thought he was the one she had spoken to. Later she changed her mind, and was asked by Mr. Katzmann about the reason for so doing:

¹ See pp. 230, 231.

"What has caused you to change your opinion?—Well I have had a better chance to see him and to hear him talk. I would have remembered him——

You have had a better chance——

MR. McANARNEY. Let her answer.

—I would have remembered him more had he committed a crime. If he had murdered any friend of mine, I would surely have remembered him.

Is that the only way you remembered people, when they murder friends of yours?—No.

What?—No, sir.

Well, what does your answer mean?—But I can remember the man in the car because one resembled so much a friend of mine I very nearly spoke to him. [1230] . . .

Have you heard him say anything since Saturday morning?—No, I have not.

Then that part of the answer 'because you heard him talk' do you mean that?—I have heard him talk Saturday morning.

You heard him talk Saturday morning, and you then said he was not Mr. Scott, in your opinion, didn't you?—Yes.

After you heard him talk. Has he said anything this morning to you?—Since I thought——

Pardon me. Has he said anything to you this morning?—No, he has not.

It was after you heard him talk then that you concluded he was not Mr. Scott, that is true, isn't it?—Yes, sir.

Then it is not his talking that enables you to say he is Mr. Scott?—I had a better look at him.

Is it a better look than you had of him Saturday?—I have looked at him now several minutes.

You looked at him several minutes Saturday morning?—Yes.

And you said he was not Mr. Scott?—I looked at him several minutes after I said he was not Mr. Scott." [1231]

She had had a talk with detective Hellier about which she was cross-examined:

"Do you remember what you said when you saw what purported to be a picture of the defendant Sacco, what you said to Mr. Hellier?—I do remember.

Pardon me?—I do remember.

What did you say?—I said, 'Those are not the men.'

Do you remember saying to Mr. Hellier that Sacco's photograph greatly resembled the man you saw in the bandits' car, but you couldn't be positive as you only saw a side view of the man? Do you remember saying that to Mr. Hellier?—No, sir, I don't remember. [1238]

Will you say that, Mrs. Novelli, you did not say that to Mr. Hellier?—I told him that——

Pardon me, I must insist now upon a yes or no answer.—I didn't tell him that.

What is your answer?—No, sir.

Let me read it to you again. After seeing three photos, did you say, on May 8, 1920, to Mr. Hellier, that Sacco's photo greatly resembled the man you saw in the bandits' car, but you couldn't be positive as you only saw a side view of the man? Did you say that to Mr. Hellier?—No, sir.

You are sure of that?—I am sure. [1239] . . .

Do you still say, after seeing Mr. Hellier, that you said the Sacco photograph greatly resembled the man you saw?—I said it resembled him.

You didn't say it greatly resembled Sacco's photograph?—No, sir.

You are sure of that?—Yes, sir.

And you didn't say it to Mr. Hellier?—I did not say it to Mr. Hellier." [1240]

In rebuttal HELLIER testified that Mrs. Novelli had told him the man "greatly resembled" Sacco. [2090]

3. ALBERT FRANTELO, formerly employed by Slater & Morrill, said he had seen two men leaning against the fence outside the factory shortly before three o'clock. He described these men:

"Will you describe to the jury now these two men you observed standing leaning against the fence outside the Rice & Hutchins factory?—The one that was nearest me had on a black cap, dark suit, dirty front on him, looked like a jersey, dark complexion and needed a shave, and he was a stocky build. The other fellow, he was light complexion—"

Before you get to the other fellow, Mr. Witness, have you told me now all you remember as to the description of the first man you described?—Except that he was—his features were quite strong.

His features were quite strong?—His face,—powerful looking face. His shoulders were broad. I would say he was about 5 feet 7 inches,—5 feet 7 or 8 inches in height. That is about all of him, I guess.

Anything else you remember as to the description of that man that you have now described?—No, sir.

Do you recall whether he had a mustache or not?—He had no mustache. He needed a shave.

To what extent did he need a shave, would you say?—Well I would say he had a week or two growth of beard on.

Have a heavy beard?—It was.

As to the color of the beard?—Black.

Very dark beard?—It was.

Was the cap pulled down on his head? I will withdraw the question. Did you observe his cap, Mr. Frantello?—I did.

Will you describe to the jury how his cap was situated on his head?—Pulled down just like any ordinary fellow would have his cap on, just resting on his forehead, about there.

Across his forehead. Did you notice the color of the cap?—I would say it was a dark cap; that is all, about all I could say about it. [1005] . . .

Now, will you describe to me the other man that you saw?—He was light complexioned. He had on a cap; dark suit. He was about as tall as the other fellow, about the same height, only he was slimmer, kind of pale looking, and his hair was light. It was not as dark as the other fellow's. I would say he was slimmer than the other fellow. He was not stocky build.

He was slimmer than the other fellow?—He was.

Have you told me all you remember about the description of that man?—Yes, sir.

Did you observe his head covering?—Yes, sir.

What was it?—He had on a cap.

Did you observe the color of the cap?—It was a dark cap.

Did you observe the color of his clothing?—Dark suit.

Did you observe whether he had a mustache or not?—He did not have a mustache. [1009] . . .

Was there anything else about them that attracted your attention particularly?—The first fellow was criticizing the fellow that was further away from me.

MR. KATZMANN. What was that?

THE WITNESS. The first fellow was criticizing the other fellow. That is what made me pause. . . .

Can you tell me what language they were using?—Speaking in the American language.

Speaking in the American language. How near were you to them when they were talking?—I could have touched them.

Did you walk along right by them or did you stop?—I paused and looked at them.

What do you mean by 'paused'? Did you come to a full stop and look at them?—I stopped about a second and then started.

And in what position were you when you stopped in your walk to look at them?—Facing them.

Right directly opposite them?—Directly. [1010] . . .

Can you tell me from you seeing these two men at South Braintree as you described, whether or not either of the two men in the cage or the dock, were either one of those two men?—Neither of them.

Neither of them. You are sure of that?—I am." [1011]

When cross-examined by Mr. Katzmann Frantello was asked to describe two of the jurors. He made several errors in these descriptions. [1018, 1019] He was also asked his opinion of the nationality of the men he had seen and became confused:

"I asked you if you formed any impression at that time as to what their nationality was?—I couldn't say what nationality they were.

Have you ever said, sir?—No, sir.

What?—No, sir.

Do you know what nationality is meant by the term 'wop,' the colloquial term 'wop'?—Certainly.

What nationality?—Italian.

Yes. Have you ever stated to any person that they were of that nationality?—Never.

Did you so state to Officer Brouillard?—I do not recall whether I did or not.

Speak up so I can hear, will you, please.—I do not recall whether I did or not.

Will you say you did not?—I do not think I did.

You don't think you did. That is your best recollection?—It is. [1020] . . .

Now, concentrating your mind on these two men you have described, would you or would you not say that they were Italians or Italian descent?—Well, to me, they did not look like an Italian.

And the expression 'wop' means to you an Italian?—The lower class of—

The lower class of Italians?—Yes.

These men were not of any class of Italians, were they, in your opinion?—In my opinion they were not.

All right. Do you remember Officer Brouillard on February 4, 1921, asking you:

'Q. Where did you see them? A. On the rail in front of Rice & Hutchins.' Does that recall some questions on the subject matter of Officer Brouillard's talk with you on February 4th last?—That is where I saw them.

All right. That is the fact, is it?—Yes.

Do you remember Officer Brouillard then asking you,—— [1024]

'Q. What kind of fellows were they?'

Do you remember that question?—I think he did say that.

And do you remember what your answer was?—I said something about being dark complected fellow.

Yes. Did you say anything about either one being a regular 'wop,' did you?—I did not say.

You did not state it, in response to that question: 'What kind of fellows were they?'

'A. One fellow looked like a regular wop. The other looked just the same.' You did not say that to Officer Brouillard, did you?—[No response audible to stenographer.]

Nothing like that, did you?—[Witness hesitates.] I did not say that the other one looked like—I may have said he looked like a wop.

Did you say one looked like a regular wop and the other looked just the same? Did you say that, sir?—[Witness hesitates.] I think I did say something like that.

You know you did, don't you, Mr. Frantello?—I do now.

And that is true, isn't it?—That is.

You know they were both Italians whom you saw on that fence, don't you?—They were not both Italians.

One was an Italian, wasn't he, in your opinion?—Well, most Italians, the way—

Now, will you describe to me the other man that you saw?—He was light complexioned. He had on a cap; dark suit. He was about as tall as the other fellow, about the same height, only he was slimmer, kind of pale looking, and his hair was light. It was not as dark as the other fellow's. I would say he was slimmer than the other fellow. He was not stocky build.

He was slimmer than the other fellow?—He was.

Have you told me all you remember about the description of that man?—Yes, sir.

Did you observe his head covering?—Yes, sir.

What was it?—He had on a cap.

Did you observe the color of the cap?—It was a dark cap.

Did you observe the color of his clothing?—Dark suit.

Did you observe whether he had a mustache or not?—He did not have a mustache. [1009] . . .

Was there anything else about them that attracted your attention particularly?—The first fellow was criticizing the fellow that was further away from me.

MR. KATZMANN. What was that?

THE WITNESS. The first fellow was criticizing the other fellow. That is what made me pause. . . .

Can you tell me what language they were using?—Speaking in the American language.

Speaking in the American language. How near were you to them when they were talking?—I could have touched them.

Did you walk along right by them or did you stop?—I paused and looked at them.

What do you mean by 'paused'? Did you come to a full stop and look at them?—I stopped about a second and then started.

And in what position were you when you stopped in your walk to look at them?—Facing them.

Right directly opposite them?—Directly. [1010] . . .

Can you tell me from you seeing these two men at South Braintree as you described, whether or not either of the two men in the cage or the dock, were either one of those two men?—Neither of them.

Neither of them. You are sure of that?—I am." [1011]

When cross-examined by Mr. Katzmann Frantello was asked to describe two of the jurors. He made several errors in these descriptions. [1018, 1019] He was also asked his opinion of the nationality of the men he had seen and became confused:

"I asked you if you formed any impression at that time as to what their nationality was?—I couldn't say what nationality they were.

Have you ever said, sir?—No, sir.

What?—No, sir.

Do you know what nationality is meant by the term 'wop,' the colloquial term 'wop'?—Certainly.

What nationality?—Italian.

Yes. Have you ever stated to any person that they were of that nationality?—Never.

Did you so state to Officer Brouillard?—I do not recall whether I did or not.

Speak up so I can hear, will you, please.—I do not recall whether I did or not.

Will you say you did not?—I do not think I did.

You don't think you did. That is your best recollection?—It is. [1020] . . .

Now, concentrating your mind on these two men you have described, would you or would you not say that they were Italians or Italian descent?—Well, to me, they did not look like an Italian.

And the expression 'wop' means to you an Italian?—The lower class of—

The lower class of Italians?—Yes.

These men were not of any class of Italians, were they, in your opinion?—In my opinion they were not.

All right. Do you remember Officer Brouillard on February 4, 1921, asking you:

'Q. Where did you see them? A. On the rail in front of Rice & Hutchins.' Does that recall some questions on the subject matter of Officer Brouillard's talk with you on February 4th last?—That is where I saw them.

All right. That is the fact, is it?—Yes.

Do you remember Officer Brouillard then asking you,—— [1024]

'Q. What kind of fellows were they?'

Do you remember that question?—I think he did say that.

And do you remember what your answer was?—I said something about being dark complected fellow.

Yes. Did you say anything about either one being a regular 'wop,' did you?—I did not say.

You did not state it, in response to that question: 'What kind of fellows were they?'

'A. One fellow looked like a regular wop. The other looked just the same.' You did not say that to Officer Brouillard, did you?—[No response audible to stenographer.]

Nothing like that, did you?—[Witness hesitates.] I did not say that the other one looked like—I may have said he looked like a wop.

Did you say one looked like a regular wop and the other looked just the same? Did you say that, sir?—[Witness hesitates.] I think I did say something like that.

You know you did, don't you, Mr. Frantello?—I do now.

And that is true, isn't it?—That is.

You know they were both Italians whom you saw on that fence, don't you?—They were not both Italians.

One was an Italian, wasn't he, in your opinion?—Well, most Italians, the way—

Wait a minute. Wasn't one of those men an Italian, in your opinion?—Well, judging from what I know of Italians, he looked like one, but he wasn't.

Why did you say to this jury you could not tell what nationality they were or you hadn't any impression of what nationality they were before I read that question and answer to you?—Well, he isn't an Italian.

What?—From what I heard of it according to his conversation, he wasn't an Italian.

What did you tell Officer Brouillard one was a regular wop for?—Because Italians sometimes look like that, dark complexion and rough looking like that.

You have told this jury, haven't you, the expression 'wop' to you means an Italian of the lower class?—Yes, sir.

Then you meant to convey the impression to Officer Brouillard, did you not, that this man was an Italian of the lower class, didn't you? Did you not, sir?—I didn't say he was an Italian.

You said that he was a regular wop?—I said that he might have looked like one.

Didn't you say one looked like a regular wop,—did you not?—I do not recall saying the exact words. I may have said it.

Well, did you say it?—I don't recall. [1025] . . .

Why did you tell Officer Brouillard he looked like an Italian, using the word 'wop'? What did you tell him that for?—From the way he needed a shave and the way he was dressed. His face was not an Italian's face.

Wasn't an Italian's face. Did you think Officer Brouillard was asking you, when he said, 'What kind of fellows were they?' and you answered, if you did so answer, 'One looked like a regular wop; the other looked just the same,' were you talking about clothes or face?—The only time I said was—

Were you talking about clothes or talking about face when you made that answer?—I don't recall whether it was the clothes or face.

What is your judgment now of what you talked about?—It may have been the clothes; it may have been the face. [1027] . . .

Wherever and whenever that interview with Brouillard was, do you remember his asking you this question:

'Q. Could you tell they were talking in English?'
and your answer,

'No, I couldn't say.'

Did you make any such reply to any such question?—I don't recall.

What?—I don't recall that I did.

Will you say that you did not?—I don't recall.

Will you say that you did not say that to Officer Brouillard you could not say whether they were talking in English, or not?—I don't recall whether I did say it or not. [1032] . . .

Now, if you told him on February 4, 1921, or whenever the interview was, that you could not say whether they talked English or not, you were not telling the truth, were you?—I was telling the truth.

If you said that, that was not true, was it?—I don't recall saying that. I don't care about that. I am asking you, if you did say it, it was not true, was it?—I don't recall saying it.

If you did say it, it was not true, was it?—That is not the way I heard him.

If you did say it, it was not true, was it?—Well, I will tell you the truth. He was speaking the American language, that is the truth." [1033]

4. WILLIAM G. FOLEY, who had been working at the excavation at the time of the crime, saw two men in the car just before the shooting and testified that they were not the defendants [1591, 1592]. On cross-examination he said he had also noticed a man in the back of the car but could not say whether he was one of the defendants or not. He added that he meant to say only that the driver was neither of the defendants [1597]. He also saw the shooting but could not describe the bandits. [1594]

5. EMILIO FALCONE, another laborer working at the excavation, saw two or three men get into the automobile and said that the defendants were not the men:

"Are you able to say that that man you saw there, that you just described, is either of the two defendants sitting here in the cage?—No, they don't resemble. Those two doesn't resemble that man.

Would you say that the man that you saw guiding the automobile, that you described a few minutes ago, was either of the two men in the cage?—No, sir, because this man was sunk in, and this chin was long." [1080]

This witness had seen one man shoot and another man pick up the box; he said they both resembled each other. Asked again about the defendants he testified:

"How long did you look at these two men you have described or mentioned, the man who did the shooting, and the man who took the money box?—Well, I told you before, and I tell you now, as near as I can remember, three or four minutes.

Can you tell me now whether either of those two men you mentioned or described, namely, the man you saw do the shooting and the man you saw take the money box, are either of the two men in the cage?—No, neither of those two resemble them, because they had kind of a pale face.

Can you tell me whether or not these two men are the men you saw in South Braintree that day?—They don't resemble.

Well, what is your best impression, are these the men, or are they not the men?—Well, for God's sake, I said they don't resemble those men. Why do you ask me again?" [1081]

On cross-examination Falcone was asked if Sacco did not appear to him to have a pale face:

"Do you say that the man in the dock sitting on the right, without any mustache is not pale-faced? Do you say that?—No. What I meant was that he was white-faced, clean. He looks dark.

How about his color?—Well, that is dark. [1086]

You mean his hair is dark, don't you?—Well, that man looks to me like a man that is working inside, that is, in some factory. He didn't look rough. His face was clean.

Which man are you now talking about, the man you saw on the street or the man in the cage?—The one I saw over there.

Where?—In South Braintree.

Well, that man sitting in the cage, without a mustache, doesn't look to you like a man who has been working inside, does he?—No; he looks dark.

Well, his face doesn't look white to you, does it?—The other man's face was like a woman, clean, young looking.

MR. KATZMANN. I ask that be stricken out, if your Honor please. I asked him if that man looked as if he worked in a shop, the man in the cage.

THE COURT. Strike that answer out, please, as not responsive.

Does that man without a mustache in the cage look to you like a man who has been working indoors in a shop?—I can't say.

Well, does his face look white to you?—No. The other man looked clean, young looking face. His face didn't look rough.

MR. KATZMANN. I ask that be stricken out, if your Honor please, and the witness required to answer the question.

THE COURT. Tell him to answer the question.

Does that man in the cage, does his face look white to you, the man without a mustache?—He looks dark; that man in the cage looks to me dark.

His face doesn't look white to you, does it?—No, sir.

And you are talking about the man without any mustache who is in the cage?—Yes.

Red cheeks?—Why, it doesn't seem that they are red, but the other man was white.

This man is not white, is he?—Why, no. He looks dark." [1087]

On redirect-examination the witness was once more asked about Sacco and again expressed irritation:

"Did the man that you saw wrestling with the watchman look anything like this man? Wait a minute before you answer. Have I asked that before this afternoon?—Yes.

MR. CALLAHAN. I submit, your Honor, I have not put the question.

THE COURT. I told you to put it. It is your fault if you don't put it. I give you the privilege, just as specifically as you want.

Does the man you saw wrestling with the watchman look anything like the man on the right?—He does not resemble him at all.

MR. CALLAHAN. That is all.

THE WITNESS. I told you. How many times you want me to tell you he does not resemble him?

Recross-Examination

(By Mr. Katzmänn.) Do you know the watchman's name?—No, sir.

Of the four men, which one got the nearest to you?—The paymaster got

the nearest to me.

And he is the only one you can¹ describe of the four, isn't it?

MR. MCANARNEY. Wait a minute, please. I object to that question.

MR. KATZMANN. I press it, if your Honor please.

MR. MCANARNEY. I object to it.

THE COURT. Can't the jury draw the inferences?" [1091]

6. PEDRO ISCORLA, a Spaniard working at the excavation, testified that he had seen a thin, light man shoot Berardelli and a dark man shoot Parmenter. He was sure that neither defendant was one of these men. [1097, 1098]

On cross-examination he testified:

"Did the man who shot the paymaster fire any shots at the policeman?—No.

The man who shot the policeman was a light-haired man, wasn't he?—I am not sure, I didn't see.

Why, haven't you said—Well, he was light complected, light complected like this juryman here, wasn't he, or lighter?—About." [1101]

The witness' attention had not been called to the occurrence until the January after the event but he had remembered the description of the men "because I saw it very clear." [1103]

7. HENRY CERRO, a granite cutter also working at the excavation, saw only one man, whom he described as slim and light:

"First of all, will you describe to the jury the man you saw do the shooting? Will you tell the jury what he looked like?—Gentlemen of the jury, the man that I seen with my eyes doing the shooting was a man that looked to me taller than I am, kind of slim, lighter complexion.

MR. KATZMANN. What is that?

Taller than I am, slim build, overcoat on, that is, with his coat turned up, with a soft hat. That is about the description I could get out of him,—smooth face." [1106]

He was sure it was neither defendant [1110]

8. SIBRIANO GUDIERRES, another stone worker, said he had seen both a dark man and a light one and had seen both of them shoot. He also was sure the defendants were not the men he had seen. [1114]

9. MRS. BARBARA LISCOMB testified that she had looked out of a window in Rice & Hutchins' factory and had seen a dark man pointing a revolver towards the factory:

"And when you looked out that window, what did you see?—I saw two men lying on the ground, and one man, a short dark man, standing on the ground facing me, with his head up, holding a revolver in his hands.

¹ The word 'not' is apparently omitted from the question at the point marked by the numeral, as the witness had testified—1090—that he could not describe the paymaster.

Did you get a clear view of his features and his face?—Yes, sir, I would always remember his face.

What is that?—I will always remember his face.

Now, did you see the automobile when it went away?—No, sir. I imagine I was at the window about two seconds.

Did he have a revolver, this man you saw?—Yes, sir.

And what did he do with it?—He was holding it, pointing it toward the factory, toward the window which I was looking out of.

What did you do then?—I sort of fainted away.

Were you later taken, either by the officers or by some one in the factory, to see some men?—Yes, sir.

Where, first?—I was taken first to Braintree.

How soon was that after the shooting?—Well, I really do not know, but I think it was about four or five days after, this last time.

Did you later after the arrest of these men,—were you taken to the Brockton police station?—Yes.

Do you remember who went with you?—No, I do not. I did not know any of the girls at the factory.

By the way, how long had you worked at the factory?—I had worked at the factory about three months.

When did you get through?—I got through about three weeks after the shooting occurred.

When you went to the Brockton police station were you shown some men?—Yes, sir.

And you have looked at these men in the dock?—I have.

Are either of the men in the dock the man you saw pointing the revolver at your window?—No, sir.

Are you sure about that?—I am positively sure." [1191]

She was cross-examined about having been taken to see Orciani at the Town Hall in South Braintree and was positive it was four or five days after the shooting and could not have been as long as three weeks afterwards. [1192] She was also asked about where she had noticed the bandit:

"Well, it is certain, is it not, Mrs. Liscomb, from your recollection that yesterday afternoon you put the man whom we called Berardelli, the guard, on the sidewalk to your left, didn't you?—Yes, sir, I did.

Ten or twelve feet to the left of the corner of the building?—Yes, sir.

Now, Mrs. Liscomb, did you not yesterday afternoon place the standing man, the man standing in the street, opposite that man?—No, sir.

You are certain of that?—I am quite certain.

Are you positive of it?—No, I am not positive. [1206]

So your recollection goes back to the description of a man's face on April 15, 1920, and you are positive about that, and you cannot tell this jury what you said yesterday afternoon between twenty minutes of five and five o'clock. Is that right?—No, sir.

What is wrong about it?—I am telling you as near as I can.

I know. But I am asking you if you can remember what you told this jury between twenty minutes of five and five o'clock yesterday afternoon?—I think I remember.

What did you say then about where the man was?—I told you he was standing opposite me.

Are you sure you said that?—Yes, sir. I am quite sure I did.

Are you positive you did?—No, I said before I am not positive.

Then you do not distinctly remember what you said less than twenty-four hours ago, do you?—Yes, sir.

What?—I am not,—not exactly positive." [1207]

10. FRANK J. BURKE, an itinerant glass-blower, had been on Pearl Street near the railroad station and had seen the car as it approached the crossing. He had watched one of the men climb over the back seat into the front seat just as another man was getting into the machine. [972]

"Now, when you got to the point near the railroad crossing and as you have testified stopped, will you tell me what you observed?—As I said, I seen an automobile coming slowly up the incline toward the railroad track. Just at that time two men run in a diagonal direction and jumped on the running-board of that car and got into the back part of the car. The car proceeded then toward the railroad track. . . . As the car approached the crossing, the car came to the crossing, one of the men who was in the back of the car started to climb over the back seat into the front seat with the driver. About that time a shot was fired from the car, what part I couldn't say, but there was a report from the car. This man climbed over into the front seat and sat himself in alongside of the driver [972]. . . . After he got seated in the front seat, he faced toward me. There was a man running up the street behind the car hollering, 'Stop them! Stop them!' And this man who was on the front seat, he leaned slightly forward, grabbed hold of the door, leaned forward and poked a gun, a revolver, at me, and snapped it, and said, 'Get out of the way, you son of a B.'

Using the English language?—Fully.

Did you get a view of that man?—Yes, sir.

Will you describe that man to the jury.—This man appeared to be a thick, short,—thick set, shortish looking man, the way he was crouched in the seat, with a very full face, a pronounced full face, flat, and a broad, heavy jowl, a man that would be noticeable most in any place—

MR. KATZMANN. I ask that be stricken out, if your honor please.
—to me.

MR. KATZMANN. I ask that be stricken out.

THE COURT. 'That he was noticeable to me,'—that may remain.

MR. KATZMANN. Yes.

How heavy a man would you say he was? How much did he weigh?—I couldn't say, because I did not see his height, but he was a stocky built man, very stocky built, apparently.

Can you give me any approximation as to his height, how tall he was? —Not naturally. He was sitting, stooping down.

Can you further describe him?—What do you mean, his personal appearance?

Yes.—No, only that he looked rather of a desperate type of man. He looked dark. He was very dark complected, and needed a shave very badly.” [973]

Burke was asked about the defendants:

“Having in mind, Mr. Witness, what you saw of the men in the automobile that you now describe, are you able to say whether or not those men were either of the two defendants in the dock?—I would say they were not.” [977]

A few days after the arrest of Sacco and Vanzetti he was taken to see them at the Brockton police station. [979]

On cross-examination Burke said he had not known that any one had been killed when he saw the car go by, but had heard shooting and seen men jump on the car:

“[By Mr. Katzmann.] What moment on April 15th did you first learn somebody had been killed?—How did you put that question?

What moment on April 15th did you first learn somebody had been killed?—After the automobile had passed the point where I was.

Yes. So up to that moment you had no knowledge of what had caused this excitement, had you?—No, sir.

And you were not particularly interested in the car or its occupants for that reason, were you?—I was interested because,—yes, I was.

You were not interested in the occupants of the car until somebody leaned out and pointed a revolver at you, were you?—I was interested when I saw the men running and jumping aboard the car after the excitement down the line.

Did you know what the trouble was then?—I knew there was shooting? [979]

Did you know there had been shooting there?—I heard shots fired.

Did you know there had been shooting there then?—I heard shots fired.

Did you know that the men who were running to the car were in any way connected with the shooting?—I inferred, yes.” [980]

He was also cross-examined about his knowledge of cars:

“Are you familiar with a Buick car?—No, sir.

How could you tell it was a Buick?—Well, I saw one this morning. I rode over in it and noticed the name plate on it while I was waiting to take a ride over.

Whose Buick was it you rode over in this morning?—What say?

Whose Buick was it you rode over in this morning?—[Witness hesitates.] Lawyer Callahan’s.

An open or closed car?—Closed car.

Closed car. Who else came with you?—Mr. Callahan.

I mean, anybody other than—— —A nice looking young man who I

did not know.

Don't you call Mr. Callahan nice looking?—Well, I don't like to flatter him.

Did you look at the name plate on Mr. Callahan's car this morning?—I did, yes, sir.

Was it a Hudson or a Buick?—I believe it is a Hudson, now that you call my attention to it. It shows my lack of knowledge of cars. [982]

You admit that, do you? And your eyesight was so good this morning that after looking at the name plate in front of the car, you called a Hudson car a Buick; is that correct?—Yes.

How close were you to the front part of Mr. Callahan's car this morning?—I think I was resting my hand on the radiator when I was looking at it. He was filling the radiator.

And you read the name Buick or a Hudson car, did you, as close as that?—Well, I formed that impression. I thought it was——

Your eyes are not very good, are they, Mr. Burke?—Fairly good, sir.

MR. JEREMIAH MCANARNEY. Pardon me.

THE COURT. 'Is your eyesight good?'

THE WITNESS. Fairly good for a man of my years, yes.

How old are you?—Fifty-five.

You squint a great deal, don't you?—Always did.

Yes. You couldn't see that plain without putting your glasses on, could you?—I always when I am reading put my glasses on, or most always.

What was the shape of the figure on the front of Mr. Callahan's car that you saw this morning?—Now, that you——

What was the shape of it? I haven't 'now' anything about that. What was the shape of it?—Triangular.

That isn't a Buick, is it?—I do not know the shape now of the Buick one. If I see a name plate I can tell what they are.

You saw a name plate this morning?—Yes.

You could not tell what it was, could you?—You mean to say I could not read?

Well, you didn't, did you?—What?

You did not read it right, did you?—I did, but I——

You what?—The impression wasn't enough on my memory to remember that.

It impressed you enough to go around the radiator and look at it, didn't it?—No, I didn't go for that purpose, sir." [983]

When asked why he had not noticed the face of the driver of the car Burke said it was because he was leaning forward:

"—He seemed to be leaning over all the way across; the car seemed to be running too slow.

How far was he leaning forward? How prone was his body?—What do you mean? Do you want me to illustrate?

Yes please.—[Witness does so.] He was over that way [indicating],

reaching over to,—do you drive a car, Mr. Katzmann?

THE COURT. He is not a witness.

THE WITNESS. No, but—

THE COURT. Don't ask him questions. He may answer them now. You better refrain from that. You have to answer his.

How prone was he, as you have illustrated?—Yes, leaning over, working on his dash.

Head down?—Apparently.

Head down so that you could not see his face?—I couldn't see his face, no.

Steering the car with his head down across the crossing. Do you mean that, Mr. Burke?—Leaning down.

Well, leaning how far down, was he leaning with his head so far down he could not see what was going on ahead of him?—I suppose he could see what was going on. Naturally a man couldn't drive a car without that.

Now, you know he could see, don't you, Mr. Burke?—Yes, he could see.

You know his face was above the dash, don't you?—Yes. It must have been. His vision must have been above it or he could not have driven over the crossing.

Then it wasn't because he was leaning forward that you could not see his face, was it?—Well, it makes a difference what angle you are looking at a man at. You realize that.

The angle was much less then than as the car approached you, wasn't it?—I didn't see his face at all.

What prevented you seeing his face?—Because he was bending down and I was occupied with other things.

But didn't you just say he was not bending down so far he could not steer and could not see what was ahead of him?—Yes, I have said,—that is logic.

It is truth, isn't it?—Yes, sure, he must be.

Then his face was visible to you?—No, sir, I could not see his face.

What prevented you from seeing his face?—Because he was stopped forward." [991]

Burke was cross-examined about his occupation and about visits to Mr. Moore's office:

"What did you say your business was?—Giving educational exhibitions of glass blowing.

In the art of heating the substance, which you blow into?—Different forms.

Different forms.—Going around to schools, public schools and organizations, putting on that exhibition.

How long have you been so occupied?—About three years.

What did you do before that?—Previous to that I was in the Fore River Shipbuilding Company for a while.

Perhaps you better raise your voice.—Previous to that I was in the Fore River Shipbuilding Company.

In what capacity?—Welding.

Was that your trade, welding?—Part of it. I have got a number of different,—smatterings of different trades.

What other lines of business have you been in?—Shoe working. Been a shoe worker.

How long were you a shoe worker?—For quite a number of years.

In what branch of that science?—The making room.

Making room?—Making room, and in what they call the 'gang room.'

Were you sent for on each occasion you went in to Mr. Moore's office?—Yes. The first time I came from Somersworth, New Hampshire. I got a letter which was forwarded to me from John McCarthy, and I came down.

Requesting you, in substance, to go in there?—No, to come down. Wanted to know when I would be back and wanted me to come in and see him when I got back.

Well, the plain fact of the matter is, is it not, Mr. Burke, you have been assisting in this case in the preparation of the defense, haven't you?—No, sir, I haven't.

What was the occasion of your going to Mr. Moore's office a dozen times or more to tell your story?—Several reasons.

What are they?—As I understood you, in the first part of my examination, I was not allowed to tell any conversation that took place. If that is the case, I could not go into that.

I do not want to pry into anything of that sort. But did you do anything else when you got in there except to tell your story? Did you tell your story a dozen times to Mr. Moore?—No, sir, I did not.

Then you went in on some other business?—Yes, I went in on other business. [997] . . . I went in on something that was concerning me personally in this case." [998]

What this personal matter was did not come out.

AUGUSTUS PECHEUR, a partner of Burke's, corroborated his presence in South Braintree on the day of the crime, but differed from him on some details of their visit. Burke said he had been there only a short time before the shooting [970]; Pecheur that it was about an hour and a half [1000, 02]. Pecheur had heard the shooting but not seen the escaping car.

11. WINFRED H. PIERCE, a shoe maker employed by Slater & Morrill, testified that he had looked from a window on the Pearl Street side of the Hampton factory directly after the shooting and had seen in the car two men, one of whom had been in the act of going over from the back to the front seat. He said he did not think either of them was one of the defendants. [1044]

On cross-examination he was unwilling to say positively that Sacco was not one of the men:

"And you don't say, do you, Mr. Pierce, that the defendant Sacco is not that man?—I don't think so.

That is as strong as you want to put it?—That is as strong as I possibly can.

You cannot honestly say that he is not the man, that he is not the one and the same man that was leaning over with his arm extended?—No, I cannot.” [1049]

12. LAWRENCE DUBOIS FERGUSON, who had been working next to Pierce, also said that he had seen a man climb over to the front of the car. Like Pierce he would not go on record as being positive that neither of the defendants was the man. [1070]

13. DANIEL JOSEPH O’NEIL, a school boy, who at the time of the shooting had been sitting in a taxicab, ran to the corner after he heard the shots and saw the car come along. He watched a man open the back door and walk along the running board to the front. He testified about the occurrence:

—“Well, as this car mounted the crossing, I seen this man reach out there to turn some knob that opens the door or unbuckle the fastening that held the curtain down, reach out his hand and do something and open the door, and he came right out on the running board of the side of the car, this man, with a gun in his hand, and he walked along that running board, and before the car had got over the other side of the crossing that man was sitting in the front seat of that same car, with the gun still in his hand, and sort of leaning out of the door, and he pointed at the cobbler as the cobbler stuck his head out or came partly out of the door of the cobbler shop, and the car went out of my sight. . . .

Now, will you describe that man to the jury?—That man was a man of about my build, a little, an inch or two taller, as I should figure it, and dark hair, cleanly shaven, broad shoulders and held himself erect and square, of light complexion, cleanly shaved, and that would account for it. He wore a blue suit and no hat, and his hair was thick but straight and combed back straight over his head. That is all.” [1392]

On cross-examination he testified that the back door of the car had swung in such a way that there was no obstruction for the man to overcome as he walked forward [1395]. The jury was later taken to see the car, which had been in the Manley woods, and was shown that the door opened towards the front, so that a man walking along the running board would have had to climb over the door [2101].

14. OLAF OLSEN, another Slater & Morrill shoemaker, heard shots as he walked out of the drug store near the railroad crossing and saw the automobile at the crossing. He observed only the driver and said he was neither of the defendants [1485, 1486]. Olsen was unable to say whether or not the defendants had been among the men in the back of the car [1487].

15. NICOLA DAMATO, a barber on Pearl Street, testified that he had seen the car go by from the inside of his shop and had noticed a light haired man with a gun who was neither of the defendants. [1488]

Mr. Katzmman attacked this witness on cross-examination because before testifying he had stopped to look at the defendants although he knew

from the papers that they were dark and claimed the man he had seen was light:

"Did you know, did you have it in mind, rather, that if the two men under arrest in the trial were black-haired men, and the man you saw was light-haired, that, of course, neither of them was the man whom you saw? Did you have that in mind before you took the stand?—Yes.

Yes. So you really did not need to look at them, did you?—Of course what I read in the papers, yes. [1491] . . .

Did you think they were dark-haired after you read it in the paper?—Yes, but the way I understand, but thinking to myself and reading the paper is a different thing.

What did you think after you read the paper?—The way I read in the paper, they were black-haired, because they say in the paper that.

Because they say in the paper that?—Because they say in the paper that.

Did you believe that?—I believed it because I saw the two men now, sir." [1492]

Eight railroad laborers who had been working on the tracks near the crossing testified that they had noticed one or more men in the car.

16. CESIDIO MAGNERELLI saw a driver who was of light complexion and a man next him who was dark. He was sure the defendants were not these men. [1254]

17. DONATO DiBONA testified that the men he had seen were not the defendants. [1260] He described his experience:

"—Well, I went out in the street and I seen this automobile coming up, and I seen these two men in the front, the driver and this other man, with a gun in their hand.

Which one had the gun, the driver or the other man?—The other man, on the right hand.

Yes.—And so, when they were coming near, because at that moment I seen that fellow, that he had the gun, kind of more like a machine gun, working like this [indicating], and as soon as that fellow saw me that I was in the middle of the street and I had the shovel in my hand, just as soon as he sees me he tried to point a gun at me. Maybe he thought I was going to do some damage.

MR. KATZMANN. One moment.

Never mind what you thought. You had the shovel up on your shoulder?—Yes.

He swung the revolver towards you?—Yes.

What did you do, or what did he do? You must not tell us what you thought.—Yes. I just, when I seen them fellows were coming up, because I just seen the gun there, and I know there was bad things, so I ran back where I was, near to those sand piles over there.

You have told about two men on the front seat. Did you see anyone do

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You have told about two men on the front seat. Did you see anyone do

anything in back of the driver's seat?—No.

You did not?—No.

You have told us what you saw. Describe the man who was driving the car. What did he look like?—Well, he is kind of a slim fellow, kind of light complexioned, anyway.

Should you say a large or small man? How did he impress you?—No, he was kind of a slim man, he was a skinny fellow, that was the driver. . . .

Tell us the best description of the man that you can who was sitting beside the driver?—The man that was sitting beside the driver was a stout fellow, stout man, kind of broad chest.

Light or dark complexion?—Dark complexion." [1259]

18. FORTINATO ANTONELLO said he had seen a light, slim faced man behind the driver who pointed a gun at him: he had noticed no one else [1268]. He was not asked about the defendants on his direct examination. On cross-examination he said "I did not even look towards them" while giving his testimony, and had not seen them in court, but had seen their pictures in the papers [1270, 1271]. Mr. McAnarney then asked both defendants to stand up and had the witness look at them. Antonello stated that neither was the man he had seen: "No. The one I saw, he was more light, and slimmer, younger." [1271]

19. ANTONIO FRABIZIO saw only the driver, whom he described as "light in the face" [1272]. That man was not one of the defendants. [1273]

20. TOBIA DI BONA saw two men in the front of the car and two men in the back. He described the driver as of "light complexion" and the other man in the front as "big, and a dark looking man." He could not describe the other two [1274]. On cross-examination he said he could not say whether the two men in the back might or might not have been one or both of the defendants. [1275]

21. NICOLO GATTI, another of these railroad workers, testified that he had met Sacco about eight years earlier, that he had seen a light man fire a shot from the car and that he was certain this man was not Sacco. He had also seen the driver and a man sitting next him and they, he said, were not the defendants. [1211, 1212]

22. DOMINICK DI BONA testified that, shortly before 3 o'clock, on his way down Pearl Street to a spring to get water, he had noticed a man fixing the engine of a car, and had later seen the same man driving the car when it went over the crossing after the shooting. This man was light in complexion. Di Bona said he had also seen another man jump into the car and that neither of these men was one of the defendants. [1242-1245]

23. JOSEPH CELLUCCI testified that he was the only one of the railroad laborers who eluded the foreman. He said he had seen one man next the driver, also another, between the front and the back seats, who was shooting. Neither of these was a defendant. [1570, 1571]

On cross-examination he said:

"Were you the only one of the gang at work there got away from the work at the time?—After I got away, I don't know whether anybody else got away or not, but I know they all got away after the automobile went.

I mean before the automobile went?—I was the only one that got away at just that moment.

You were the only one from that gang that was on the crossing, weren't you?

MR. JEREMIAH MCANARNEY. Wait.

—Yes." [1578]

On redirect examination:

"[By Mr. Jeremiah McAnarney.] Wait a minute. You told us about you were the only one to get away from the foreman?—Yes, sir.

What do you mean by 'get away'?—You see, when we heard the shots while we were working, the whole bunch all started for the road. Well, our boss says,—he stopped the crowd. He did not want to let them go, so I happened to get away from you. I dropped my tools and I run. [1579] . . .

Will you just tell us all the foreman did to stop you and all you did to get away.—We all started for the road. He got in front of us. He says, 'Where are you all going?' Some one spoke up, 'We are going out there and see what all this shooting is about.' He says, 'Don't go out there. You will get in trouble.' So when I happened to get away, I was in back of the crowd and I gets away. I runs behind the caboose that pulls down the gates, and I got in the middle of the gates. I got away from him. . . .

Do you know really where the others of the gang were at the time the man fired the revolver at you?—When he fired at me I could not see the gang because there is a big hill of dirt right there behind the gates.

Are you prepared to say where any one was but yourself of the gang of men that were working with you?—No.

What is that?—Yes.

The question is, are you prepared to say where any of the others were other than yourself?—No." [1580]

In rebuttal the prosecution produced the foreman, ANGELO RICCI. He testified that none of his gang of twenty-four railroad workers had gone up to the crossing [2079]; on cross-examination, however, he said he did not know whether some of them got there or not:

"Did you know it was shots or whether it was a noise from an automobile?—I thought it was fire crackers.

Yes. And you did not pay any attention to it at all, did you?—No, I did not pay any attention. The gang started to go, and I stopped them. I told them not to go.

You did not stop them all, did you?—I started to stop. When you got to control twenty-four men, what to hell, one fly away. I could not tie them up with string and hold them all as one.

You did the best you could?—I did the best I could.

Yes, and quite a number of them got away from you?—I did not see any. What?—I did not see any.

You know that some of them got up there, didn't they?—No, I don't. In that confusion I don't.

What did you do when you were trying to stop them?—I told them to stay right there for fear that the road master would come and I would get the blame for it.

Did you put your hands up?—I told them, I told them to stop, with my mouth.

What did you mean a minute ago. 'When you try to stop twenty-four men you can't put a string on them'? What did you mean by that?—Well, I told you that it was twenty-four men and I told them to stop. If they went around, sneaked around the pile of dirt or something like that, I could not hold them. [2082] . . .

And you spoke to them and put up your hands?—I spoke to them. I spoke to them. I says, 'Stay there. It is nothing. It is fire crackers.'

Did any one say it was anything different than fire crackers?—They were all,—we all thought it was fire cracker, and we stayed there. In a minute the automobile went by. [2083]

Do you now remember where any one of your men were when the shooting was going on, any one man?—My conscience says they were all there where we were putting in the ties.

'My conscience.' Well, I am talking about his eyes.—And also the eyes. My conscience says they were all there, and my eyes, with the exception if some one disappeared at the time I did not see him, I don't know." [2084]

24. ELMER O. CHASE, a truck driver for the South Braintree Cooperative Association, testified that he had seen the car shortly after the shooting and had noticed the driver and another man, neither of whom was a defendant [1341, 1342]. He also said that Chief of Police Stewart, after interviewing him, had told Officer Shea: "'We haven't got the right man yet'" [1346]. Stewart denied this in rebuttal [2113] but Shea did not testify.

25. WILSON O. DORR, a laborer working on the highway, saw the car in Randolph, noticed the driver and the man next him, and described both as light in coloring. He also saw at the same time two men in the back of the car. He said he had had a good look at the faces of all these men and stated that none of them was a defendant. [1366–1368]

On cross-examination he admitted he had had a talk with Officer Pye the first day he came to Court, but denied he had told him that all he had seen was a man sticking his head out of the automobile.

"But you did have the talk with Officer Pye.—Yes, sir. He tried to tell me that I didn't see anything.

He tried to tell you that?—Yes, I made no remark. I didn't answer him.

Officer Pye of the Stoughton force tried to tell you that was all you seen?—He told me I couldn't see anything when they were going so fast as that, and I didn't answer him.

And you didn't answer him?—No.

You didn't say all you saw was the man sticking his head out of the window?—Decidedly I did not." [1369]

In rebuttal OFFICER PYE testified that, Dorr, while waiting during the trial, had told him he had been unable to recognize the men in the car. [2091] On cross-examination the following took place:

"[By Mr. Jeremiah McAnarney.] Well, then, what answers this man Dorr made to you were in response to questions that you asked him?—At the last of it, yes.

Well, he simply asked you a question about going to Dedham?—Yes.

And then you proceeded and asked him a series of questions, didn't you?—I asked him what case he was on here.

You asked him more than that, didn't you?—Yes.

You asked him what he knew about it, how fast the car was going?—I did.

Whether he could recognize who was in the car?—I did.

You asked him how many men were in the car?—I did not.

You did not?—No, sir.

You skipped that one. You asked him how many were on the front seat?—I did not.

Did you ask him how the curtains were?—I did not.

How near he was to the street?—I did not.

Did you ask him whether he was alone or some with him?—I did not.

MR. JEREMIAH MCANARNEY. That is all." [2092]

26. Summary

It is difficult to appraise the testimony of those who are merely denying the identity of a stranger. Not one eyewitness produced by the defense had known Vanzetti; only one—Gatti—had known Sacco, and he had not seen him in eight years, since 1913. For that reason the testimony of these people has not been given here with as much fullness as has that of the witnesses for the prosecution. Mr. Katzmann spent a considerable amount of time cross-examining some of these witnesses for the defense and developed numerous inconsistencies in the descriptions they gave. It is also doubtful whether the group of workers at the excavation were in a fit condition to observe the shooting bandits; they were described by Mrs. Nichols, a prosecution witness, as having run away at once. And the gang of railroad workers, according to their foreman, Ricci, did not get near enough to see anything. On the other hand, Mrs. Novelli, Mrs. Liscomb and especially Burke had good opportunities for observation. Mrs. Novelli, it will be recalled, admitted a resemblance to Sacco in the man she had seen, but was sure that man was not Sacco.

The defense produced no witnesses who had seen the men whom Tracy and Heron had noticed in different parts of the town before the shooting, nor any who had observed either the man on the train, identified by Faulkner as Vanzetti, or the one in the car whom Dolbeare had remarked. The

first direct conflict, following the chronological order of the events of the day, arose with Mrs. Campbell's contradiction of Lola Andrews' identification of Sacco as the man observed under the car outside the factory at about noon-time. No prosecution witness picked out either of the defendants as one of the men seen leaning against the fence just before the shooting took place and two—Bostock and Behrsin—who had observed the men there refused to make any identification. One of the defense witnesses, Frantello, was sure the defendants were not these men. Only one witness to the actual shooting, Pelser, made an identification; four prosecution witnesses would not identify—Bostock, Langlois, McGlone and Wade; Mrs. Liscomb and four of the laborers at the excavation, all five of whom had seen the shooting, testified positively for the defendants.

The man shooting from the escaping car was seen by a large number of persons. Three identified him as Sacco; these were Splaine, Devlin and Goodridge; one other witness for the prosecution, Carrigan, could not identify; still another, DeBeradinis, was sure it was not Sacco, although he admitted there was a resemblance. The defendants produced seven witnesses who testified with varying degrees of positiveness that this man was not Sacco; these were Burke, Pierce, Ferguson, O'Neil and four of the railroad workers, Damato, Antonello, Gatti and Cellucci. Other men in the fleeing car were also observed, but not identified as Sacco; Vanzetti was picked out by Levangie and Reed as one of those in the front seat. Ten defense witnesses who saw the car at the crossing or shortly thereafter testified that neither of the men in the front seat was one of the defendants; these were Olsen, Chase, Dorr and all of the eight railroad workers except Antonello.

A total of forty-three witnesses testified for both sides on the subject of identity. Eleven made identifications—four of Vanzetti, seven of Sacco; six prosecution witnesses refused to identify and one actually supported the claims of the defense. The remaining twenty-five testified for the defense.

An issue so complicated as that presented in this case cannot, of course, be determined by numbers. Such an issue depends upon the quality of the witnesses and their opportunities for observation; and it is affected, too, by the length of time between the date of the crime and the first claim of identification made by the witness. These considerations have already been referred to and will again be briefly touched on at the end of this chapter.¹

e. Discussion by Counsel and the Judge

The importance to be attached to the various identification witnesses was exhaustively discussed by all counsel at the trial in their summations. MR. MOORE said, discussing Faulkner:

"Ah, gentlemen, Faulkner, the man that knows that this is the man that rode the train, whose attention was challenged because of the possibility of a crime, this man who identifies with the certainty of the stars, did

¹ See pp. 276, 329, 330.

not know the man who sat in the same seat with him, could not say aye, yes, or no. Possibly the gentlemen did sit with him. Gentlemen, you want to weigh that kind of testimony in taking away a human life.

"Again there is a peculiar thing involved here. Vanzetti had to get from Plymouth somehow up to East Braintree on a train. He got onto it, but the ticket agent at Plymouth, at Kingston, at Seaside and at East Braintree, none of them saw him. There is no registration of tickets bought on the train. Something wrong, gentlemen. I don't know what. I am not holding the Commonwealth responsible for evidence presented." [2127]

Commenting on the testimony of Miss Splaine, he said:

"Gentlemen, that description is built bone and sinew, from top to bottom, not from what she saw from the window but from what she saw in the Brockton police station. You know it. I know it. Gentlemen, are you going to use that kind of testimony to take a human life? [2133] . . .

"Now, gentlemen, something is wrong. I do not know what. I do know that testimony of that character is not the kind of testimony that warrants taking a human life. I might go on through reading you this record referring to point after point and place after place where the lady's testimony is subject to the same character of examination. The same is true of Miss Devlin. The same is true of all of the witnesses who definitely and with any degree of finality make an identification." [2135]

Mr. Moore attacked Mrs. Andrews:

"I say to you that her testimony brands itself as manifestly false upon its face. Something wrong." [2136]

He then discussed Miss Gaines:

"Ah, but we come now to the rebuttal. This young woman who took the witness stand yesterday morning. I have forgotten her name. Pathetic, tragic little figure here that took the witness stand to do what? To corroborate Mrs. Andrews. You remember the little girl, a young woman, went onto the stand here. I do not know what her relationship is to the Alhambra rooming house. I do not know. You gentlemen are just as good judges of human character, many of you a thousand-fold better judges of human character than am I. Many of you have had a breadth [2136] of human experience and human conduct that dwarfs anything that I have had, but I will ask you, gentlemen, would you want to send a man to the chair on the testimony of the little girl that went on the stand yesterday? This little girl, a young woman who could not remember whether she had ever been in Lola Andrews room or not, who had been to the door once, twice, thrice, four, five, six times and never inside the door, and had not any recollection of what she went there for. This woman who comes we know not from where, whose relationship to Mrs. Andrews we know nothing about, but who comes to attack the credibility of Mrs. Campbell, to attack the credibility of Officer Fay, to attack the credibility of La-Brecque and of Harry Kurlansky, to attack the credibility of Miss Allen.

"Gentlemen, I say to you that even though we had not offered a single witness against Lola Andrews, she killed herself on the witness stand by

her own personality, but Campbell, Fay, LaBrecque and Miss Allen finished her up.

"Gentlemen, remember you are judges of human credibility. You are the ones to determine how much faith and credit you are going to give to the testimony of witnesses." [2137]

He suggested that Pelser had been influenced by his need for employment:

"Now, gentlemen, I do not know, but I believe that I think you are entitled to consider this: To what extent and to what degree did the desire, the economic need of a job mold Pelzer's mind into saying what they need. Consider that, gentlemen.

"Ah, there he goes, he said,—and I want before I make the remark that I am about to make, just one word on behalf of the district attorney of this county. A lawyer takes the testimony that comes in through his investigators. The pedigree of that testimony, the ancestry of it, the causes that made that testimony, the man that built the testimony, the integrity of the testimony, counsel in the heat of a battle are not always able to thoroughly analyze and thoroughly digest. They may not be disposed to. But my attitude is here, that so far as the trial of this issue is concerned, the attitude of the district attorney's office has been one of unfailing courtesy and unfailing fairness, but the ancestry of some of this testimony, for which the district attorney's office is not responsible, may be subject to serious question. I refer to Pelzer. . . .

"Ah, but what did, what made Pelzer change? I do not know. I can't tell you. I can't go into that man's mind, but I do know that when we talked to him he did not have a job and when he testified here he did have a job and he had a job with Rice & Hutchins, and I do know that \$15,797 and some odd cents was stolen and that there is an insurance company responsible therefor and that operators on behalf of that company and that company's officials are determined that some one shall pay the penalty. Proper to let the guilty man pay the penalty, but not an innocent man pay the penalty.

"I say to you how, where, when and in what manner the infinite detail with which these improper influences may be brought to bear I am not prepared to say. I do not know. But you owe it to yourselves to weigh all of these matters in determining the credibility of witnesses. Who is Pelzer? Why did he testify? Why did he change his statement? Who is Goodridge? Why did he testify? Why did he make this statement?" [2139]

Mr. Moore argued finally that it was impossible under the circumstances for any of the witnesses to have made an identification, and that no witness with an unqualified opportunity for observation had identified either of the defendants:

"Gentlemen, there isn't a single witness called by the government who had an unqualified opportunity of observation who gives an identification. Not one. Bostock had the opportunity and wouldn't. McGlone had the opportunity and wouldn't. So on down the line. But it is the Lola Andrews, the Goodridges, the Pelzers that made the identification. Miss Splaine and Miss Devlin I reject, because their testimony is utterly unreasonable. They did not have the opportunity. They could not. You know it and I know it." [2140]

MR. J. J. MCANARNEY referred to the confusion in the descriptions given by the witnesses. He objected to the manner in which the defendants had first been shown to the persons asked to identify, on the ground that they had not been lined up with other men and emphasized Bostock's refusal to identify.

"Gentlemen, isn't that the man to say if these were the men he wouldn't have known it when we are under the cloud—not under cloud, but when the government is carrying the burden of proving beyond reasonable doubt that these are the men and such a man as that says he can't identify them, what does it mean? Doesn't it go beyond a reasonable doubt that they are not the men and don't it prove beyond reasonable doubt that they are not the men?"

"Bostock says—and what do you say of Bostock? Was there anything weak looking about that man? He was right there, he saw them. He was within 50 or 60 feet of them when it began and started towards them. They turned and shot at him. He goes up around the corner of the fence. He describes how the curtains were. Here is the fence [indicating]. He goes behind it. As it comes up he describes how those curtains were. 'If I put my hand out I could have touched the automobile.' Not a person leaning from one window to another trying to get a fleeting glance. No, with his eyes all the time. He could have touched the automobile if he wanted to.

"Are these the men? What do you say about that? Doesn't that, if we stop right there, or if we went a thousand times beyond there, wouldn't these two men be two men—English speaking men—wouldn't that prove to you that these were not the men? Gentlemen, I can't add to that. That is the government's case. That is the case on which they asked you to say these are the men. Just think of what that means, gentlemen. On such evidence as that they want you to say that these are the men.

"Well, gentlemen, we slip along this identification. We pick them as we get them. Unfortunately there were Spaniards and Italians there. Surely the prosecution has paid a wonderful compliment to the Italian race in this case. It is the first time in my history, in my experience as a lawyer was a race indicted as they are in this case. Not weight enough is given to any evidence of those Spaniards or of those Italians that they are dignified by being asked a question or what they saw by the prosecution.

"Turn that over. Roll that over in your mind and see the significance of that, gentlemen. Is it to be presumed because an Italian is an Italian that he is a murderer, that he will shield a murderer? Is it to be presumed that a Spaniard in being a Spaniard is not a man and that he will shield a murderer? All these men were there, and that left handed attempt of the foreman to try to show they were not there, and he finally included himself, and was there." [2152]

Mr. McAnarney ridiculed Goodridge:

"We have a man also who was a rather cool, calculating fellow, that Goodridge that follows him. He came up and looked like something apparently, but he was 30 cents when he got through. I am knocking no man. A man is entitled to his dignity when he takes this witness stand, and he is entitled to his manhood, he is not entitled to be browbeaten by any

attorney; but when that man Goodridge came here it turned out he was up here on business of his own with his attorney here on the September term and following them, and that he went away and that later he had an identification of this man, no question about that. Where he dreamed that, I don't know, but when he talked with other men there in Braintree he did not know this man." [2155]

He attacked Mrs. Andrews:

"She said that is the picture she pointed out to Mr. Moore as not being one of the men that was there at the Braintree shooting. She says that he showed her a folio, showed her some pictures, and the stenographic record shows that X is the picture that she says she pointed out to Mr. Moore as being not one of the men there. X—that is the man she pointed out to him as being not one of the men. I will pass it up to you. Mr. Moore showed her some pictures, and that was the one she told him was not one of the men there. We then had an intermission, gentlemen. After dinner she comes in and Mrs. Andrews takes the stand again, and she then says that this she thinks is the face that she pointed out to Mr. Moore as one that was there. That is enough, gentlemen. What she had for dinner was more than milk.

"Yesterday she brought in a little help there from this poor lady, and I rather pitied her. Do you remember what she said? She said Mrs. Andrews said there that night or day when she was talking and telling her who it was—Mrs. Andrews said here she went up to the man who was under the machine—and Mrs. Andrews tapped him on the shoulder and asked him how to get into Rice & Hutchins. The man was under the machine, and this poor lady says Mrs. Andrews says she tapped him on the shoulder. She wasn't here, she did not hear all that, she was doing the best she could. It was rather weak." [2174]

He also argued that it was improbable the bandits should have made themselves as conspicuous as the gate tender, Reed, had claimed in his testimony, and that Reed's identification of Vanzetti was therefore not trustworthy. [2173]

The District Attorney, MR. KATZMANN, argued that the defense witnesses had told inconsistent stories; he pointed to contradictions of their statements by other witnesses. He disavowed Wade:

"The Commonwealth, on the vital testimony it was expected he would give from utterances that he had previously made to the officers of the law, finds nothing to believe in what Lewis Wade said. It is in the evidence here that Lewis Wade told the district attorney of this district in the Brockton police station on the 6th day of May that he was sure that the defendant Sacco was the man who killed Berardelli, and you heard what he had to say in the lower court here that he was not sure, and then you heard what, and I heard for the first time, what he had to say about it here.

"Unknown to the Commonwealth a month before in a barber shop on Pearl Street, South Braintree, gentlemen—and you have heard Arrogini testify for the defense—he saw a man that looked so much like the defendant Sacco that he was no longer sure of what he had told an official, who

was seeking to do his duty by this country, that he was sure, I find little to believe in Lewis L. Wade, and I leave him in your hands." [2212]

Mr. Katzmann approved Pelser:

"He falsified to the defense. He falsified to the Commonwealth and then it became necessary for us to show you, and we did show you, how it was and when it was we first learned that he knew anything of the actual shooting of Berardelli. His identification on the stand in direct examination of the defendant Sacco was positive. He was the nearest—if not the nearest, there could not have been anybody who could have been much [2212] nearer than he, and I think he was the nearest to the actual shooting of Berardelli. . . .

"Confirmation through Barbara Liscomb of what he said, He was frank enough here, gentlemen, to own that he had twice falsified before to both sides, treating them equally and like, and he gave you his reason. I think he added that he had never been in court before. If not, somebody has and I confused him. It is of little consequence. He is big enough and manly enough now to tell you of his prior falsehoods and his reasons for them. If you accept them gentlemen, give such weight to his testimony as you say should be given." [2213]

Mr. Katzmann argued that it was more likely for people to deny they knew anything which would convict defendants than otherwise. He pointed out that Dolbeare might have been one of the jurors, and tried to establish his credibility in that way, saying:

"and you must have recognized from that fact a peculiar quality that you 12 men had in common with him. And perhaps you would not be blamed if you did so congratulate him; but when Dolbeare appeared on the stand and told you that, your interest in him must have been awakened, must it not, that is a fair statement, perhaps more than in any other one witness, because you had something in common with him." [2214]

He admitted that Levangie had made a mistake in describing Vanzetti as the driver of the car, but argued that perhaps Vanzetti had been sitting behind the driver, so that Levangie's identification might be accepted by the jury:

"They find fault, gentlemen, with Levangie. They say that Levangie is wrong in saying that Vanzetti was driving that car. I agree with them, gentlemen. I would not be trying to do justice to these defendants if I pretended that personally so far as you are concerned about my personal belief on that, that Vanzetti drove that car over the crossing. I do not believe any such thing. You must be overwhelmed with the testimony that when the car started it was driven by a light haired man who showed every indication of being sickly.

"We cannot mold the testimony of witnesses, gentlemen. We have got to take them as they testify on their oath, and we put Levangie on because necessarily he must have been there. He saw something. He described a light haired man to some of the witnesses. They produced Carter, the first witness they put on, to say that he said the light haired man,—the driver was a light haired man. That is true. I believe my brothers will agree with

me on that proposition, but he saw the face of Vanzetti in that car, and is his testimony to be rejected if it disagrees with everybody else if you are satisfied he honestly meant to tell the truth?

"And can't you reconcile it with the possibility, no, the likelihood or more than that, the probability that at that time Vanzetti was directly behind the driver in the quick glance this man Levangie had of the car going over when they were going up over the crossing. If you recall the hole in the sign board right near Levangie, or not far from his shanty, will you have any difficulty in dealing with the testimony of Levangie?"

"Right or wrong, we have to take it as it is. And I agree if it depends on the accuracy of the statement that Vanzetti was driving, then it isn't right, because I would have to reject personally the testimony of witnesses for the defense as well as for the Commonwealth who testified to the contrary. I ask you to find as a matter of commonsense he was, in the light of other witnesses, in the car, and if on the left side that he may well have been immediately behind the driver." [2215]

With reference to Heron he argued:

"Was he seeking notoriety? Was he seeking to force himself as a witness upon anybody, or wasn't it simply he would not have come if he did not have to become a witness? Two and two still make four, gentlemen. And you can see how the Commonwealth learned for the first time of the witness Heron. Can you tell me what interest this man would have, he, the man who clasped eyes on the defendant Sacco coming up the walk or walking into the court house recognized him as one of a pair that were seated in the South Braintree depot in the neighborhood of half-past 12 on the day of the murder when he says he was seated in Boni's restaurant with his friend Guadenagi or his friend Bosco and somebody else.

"What are you going to do with that testimony? Why should Heron come in and commit cold-blooded perjury? Can he be mistaken in seeing that man any more than, gentlemen, you could be mistaken in recalling Dolbeare or the other witnesses who have taken the stand whose face you won't recall, and who I recall to your attention." [2216]

Mr. Katzmann argued that Sacco had a face which, once seen, would not be forgotten, and that witnesses would naturally have bent every effort to imprint on their minds the face of the bandit:

"You have looked at the face of Sacco for six weeks, and is there a man of his countrymen—and I speak of that only because of their bearing certain pigmentary characteristics, dark hair and dark skin—is there a man of his nationality who has testified on either side of this case who approached him in physiognomy? Hasn't he a face, gentlemen of the jury, that once seen you would never forget?

"But more than that, gentlemen, remember this in connection with the identification of every witness for the Commonwealth who have said 'That is the man,' or 'I think that is the man,' or 'I am sure that is the man,' or 'He is the dead image of the man,' and various phraseology that they used. Gentlemen, put yourselves in the place of those witnesses who were at or near the scene of the murder, of the crime. An outrage upon society had been perpetrated. Two human lives had been taken, and those by-

standers who were not frightened to death themselves ran away, those bystanders who either had the courage to remain or could not get away, whatever be the fact, what would you expect them to do it they could do it? [2216]

"Why, they would bend every effort they severally possessed to visualize and to remember the face of the occupants, or the faces of the occupants of that car, the instrument used by the murderers to get away. It was not a casual look. It was not the sort of look you would give to your almost associate Dolbeare. You had no particular reason save the one I have reiterated, but you would remember him." [2217]

Referring to Mary Splaine and Miss Devlin:

"Gentlemen, do you think that two young women, presumably endowed with Christian instincts, young ladies who could have no enmity against the defendant Sacco, who could have no reason for committing the most damnable of perjuries would bespeak evidence against a human being that would take his life away? Gentlemen, that passes the bounds of human credulity. You can't believe that. You cannot have looked on Mary Splaine, a smart business woman, you cannot have looked on the gentle Frances Devlin and have seen the truth shining like stars out of her young womanly eyes and believe for a moment that either or both of them would dare, before a court of justice or before God their Maker, condemn Sacco to his death with a wilful lie. You cannot believe that, gentlemen, having seen those women." [2217]

Mr. Katzmman criticized Wade and Bostock for their inability to identify [2212, 2230] and characterized Mrs. Andrews as a more convincing witness than any he had ever seen in all his long experience:

"I have been in this office, gentlemen, for now more than 11 years. I cannot recall in that too long service for the Commonwealth that ever before I have laid eye or given ear to so convincing a witness at Lola Andrews." [2219]

In his charge JUDGE THAYER dwelt on the elements to be considered by the jury in evaluating the weight of identification testimony¹ but he did not discuss any of the witnesses separately.

In his opinion written in December, 1921, he said that identification was the only issue at the trial [5549]. He pointed out that although the defendants had called more eye-witnesses than had the prosecution, the determining factor was the quality of the witnesses and that this issue of quality was for the jury to pass on [5550]. He discussed none of the evidence on the subject but pointed out the importance of the juror's having themselves seen the witnesses. [5562]

In the Gould decision of 1924 Judge Thayer stated that in his judgment the verdicts did not rest on the testimony of the eye-witnesses; nor did he discuss their testimony [3514]. He failed likewise to discuss it in his opinion of 1926 denying the Medeiros motion, except that there he referred to testimony showing Sacco had been described as leaving the scene of the crime bare headed. [4765]

¹ Quoted at pp. 91, 92

f. Witnesses who did not Testify at the Trial

The defendants made a motion for a new trial based on the affidavit of Gould; in the Medeiros' motion, they referred to the affidavits of Mrs. Kennedy and Miss Hayes, who later testified before the Lowell Committee: and in the last proceeding in the State Courts they submitted an affidavit of Candido Di Bona. A Mrs. Hewins claimed to have identified Sacco, but came into the case only indirectly. Mrs. Tattillo, known as Lottie Packard, was called before the Lowell Committee by the prosecution. A number of persons who had testified at the inquest held a few days after the crime were never called as witnesses at all.

1. ROY E. GOULD had been interviewed by the police after the shooting but had been then lost sight of until after the trial [3499]. He stated he had been right in the path of the fleeing automobile and had seen a man climb from the back to the front of the car and that this man had fired a bullet which passed through his, Gould's, overcoat [3503, 4]. He described the man:

"That this man, hereinbefore referred to, who climbed over from the tonneau of the automobile into the front seat and to the right-hand side of the driver and who passed the affiant in the automobile at a distance which the affiant would estimate as not less than five feet nor more than ten feet was a man approximately the age of twenty-two to twenty-five years and was a man apparently of slight build, clean-cut features and well dressed. He wore a blue suit and across the vest front was a small chain. His complexion was dark and he was wearing a cap but the hair that appeared around the edge of the cap was apparently black." [3504]

Gould was taken to see Sacco in jail on November 9, 1921 and was certain he was not the man he had seen firing from the car. He gave his reasons:

"that the affiant sat down in the jail room while the said Moore and the said Sacco conversed one with the other for the periods of upwards of ten minutes and during all of said time the affiant studied the features and all of the characteristics of the said Sacco and that immediately thereafter, on leaving the said jail the said affiant stated to the said Moore that he was positive and the affiant does now state that he is positive that the said Sacco is not one and the same man as the man that the affiant saw on April 15th, 1920, in the automobile at South Braintree and is not the man who was sitting in the front seat to the right of the driver of the so-called bandit car; that the affiant bases this statement on the following facts, i.e., that Sacco's eyebrows are not as heavy as the eyebrows of the man that affiant saw in said automobile and that the eyes of Sacco have not the same piercing quality as the eyes of the man that affiant saw, and that Sacco has not as high cheek-bones as the man that affiant saw, and that his features are not as sharp as the features of the man that affiant saw, and that Sacco appears to be older, heavier and broader through the shoulders than the man affiant saw.

"That the affiant is flat and unqualified in his statement that the man

that he saw at South Braintree on April 15, 1920, at or about the hour of three o'clock in the afternoon riding in the bandit car, front seat, on the right-hand side of the driver, is not the man that he saw in the Dedham County Jail and who was pointed out to him as Nicola Sacco.

"That while affiant has not seen Bartolomeo Vanzetti personally, he has seen three distinct photographs of him and that he in no sense resembles the man affiant saw at South Braintree on April 15th, 1920.

"This affidavit is made freely and voluntarily and not for any reward received or promised and affiant is willing to testify as to these facts if the defendants or either of them are given a new trial herein." [3505]

One of the police officers gave an affidavit stating he had obtained Gould's name and address and had given them to the State Police [3509]. No attempt was made by the prosecution either to discredit Gould or to dispute his opportunity for observation.

Judge Thayer, on October 1, 1924, denied the motion because this newly discovered evidence meant only the addition of one more eye-witness and would not affect the verdicts which, in his opinion, rested upon the evidence of consciousness of guilt [3514]. On appeal this decision was affirmed on the ground that the determination of the motion was entirely within the discretion of Judge Thayer.¹ [4358]

2. The affidavits of MRS. KENNEDY and MISS HAYES (who later became Mrs. Kelly), stated that they had observed an automobile standing in front of the Slater & Morrill factory shortly before the shooting, and had watched the driver, whom they described as slight and light in complexion [4508, 4513]. They also picked a picture of Steve Benkosky, one of the Morelli gang, as resembling the driver of the car. Mrs. Kennedy said they had given statements to Katzmman shortly after the event but had not been called as witnesses at the trial [4509]. There was no reference to these witnesses in Judge Thayer's decision on the Medeiros motion.

It was argued, however, by the defendants on the appeal that the District Attorney had suppressed the testimony of these witnesses and should have advised the defense of their existence [4793, 4794]. The point was considered by the Supreme Judicial Court and was disposed of by the ruling that a district attorney is not bound to call witnesses "in whom he has no confidence, whose testimony contradicts what he is trying to prove" ² [4893]. No evidence was submitted however, that the District Attorney had no confidence in these witnesses.

Before the Lowell Committee Mrs. Kennedy and Miss Hayes both testified in substance to what was contained in their affidavits [5028-5037] and President Lowell said the Committee was satisfied with Mrs. Kennedy's description of the driver. Mr. Ranney argued that the prosecution had discretion not to call these witnesses, even if they were reliable [5034]. There was additional discussion between counsel and the Committee as

¹ See p. 125.

² See pp. 134-136.

to the effect of the testimony of these witnesses on Levangie's statement and on the prosecution's original claim that Vanzetti had driven the car. [5042-5044]

WOODBURY, the defense investigator, testified before the Lowell Committee regarding difficulties he had had in connection with various witnesses on account of their prejudice against the defendants' views, and told of his unsuccessful attempts to get some of these witnesses to give him statements about what they had seen. [5216-5218]

3. The affidavit of CANDIDO DI BONA made in August, 1927, stated that he had seen a man in soldier's uniform and two young boys just before the shooting, who, right after it, had taken the money boxes to the car. Di Bona described these people as being physically very different from pictures he had seen of the defendants. He also stated he had intended coming forward in case the defendants were granted a new trial. [5415, 5416]

4. A brief reference should be made to a MRS. HEWINS who never gave an affidavit or testified but who in 1926 was interviewed by Thompson. She stated that she was sure Sacco had been driving the car when it stopped in the yard of her house in Randolph, that she had so told the prosecution, that she had been subpoena'd to attend the trial during two days, but that she had not been called as a witness. [4540]

5. CARLOTTA P. TATTILLO, also known as LOTTIE PACKARD, came into the case for the first time when President Lowell called her before the Advisory Committee on July 15th, 1927. She claimed to have known Sacco in 1908, saying that he had then worked at Rice & Hutchins' and had been active in a strike.

"Did you know his name at that time, that his name was Sacco?—Why, everybody that worked in the factory knew him because there was a strike there at that time, because I was very young, and I can trace that back; I am forty years old now and I was young at the time and I was working there at the time of the strike, and, of course, young and child-aged at that time, young, and we worked all during the strike, but we were protected, there were detectives there, I don't who they were, but this Sacco worked there in the lasting room.

He was working there during the strike?—Yes. I think, I don't say that he caused the strike, but I think he was implicated in the strike." [5109]

Asked what he had been called at the factory before the strike she said: "Sacco, or whatever he is" [5109]. She did not know whether he had come back after the strike and did not know how long he had been working. She said he had always been a happy, singing fellow. Asked whether she had seen him when he was on strike she said:

"I don't remember, my head is too full of music and things like that, to remember." . . .

The rest of her direct examination follows:

"Did you see him on the day of the murder?—I don't say I saw him, I will never say I saw him, and I don't think it was him now.

You don't think it was him now?—No, I don't think so. And anybody that has written down the statement that said that I said I saw him they are lying, and I don't care who it is, whether it's Governor Fuller or anybody else.

What did you see?—I came out of the factory at half past eleven the same as I always did when I worked there,—and in my begin[5110]ning of the story, anyway, I want to try to tell the same that I have told the Government,—that morning of that murder I had it dated the 20th, and you see I am way off because that is not the date, Governor Fuller told me the date, and I don't know whether he should have or not, but that is not so far off, that that morning there was, the morning of that affair, gentlemen, there was a machine out front, it was not in front of the shop, the Rice & Hutchins' shop——

What day was this? This was the day of the shooting?—Yes, sir, Rice & Hutchins shop is by the crossing, the first building at the right, and this machine was over the crossing, this side, just a little above that little black shanty, I don't know whether any of you gentlemen have been there——

Yes, we have all seen it.—It's just a little above that black shanty, that machine was right up above that, at the first pole, there are two electric poles, so it was between those two poles, just a little the other side of the pole; I don't remember what the machine looked like; I don't even remember the number, but all that morning we young girls, every time we would go by the window the machine was out there and we were saying among ourselves, 'I wonder who the first person is to get out and see what those people are doing,' never thinking anything so terrible was going to happen. I always came up on the left-hand side, and I went up at half past eleven, and when I got to that little Hottentot, it was on the side by the American Express, and there was a gentleman standing there——

By the American Express?—Yes.

That is way beyond the tracks?—That is not so far up. There is a large building up there that Mr. Slater had it for a shoe factory, it is one story, I always called it a Hottentot, and this gentleman was standing there——

That was below this machine?—It was opposite the machine. [Illustrating] The machine was about like where that gentleman is there, and this fellow was standing there, [indicating], and I went right along about my own business. Mr. Parmenter was standing there, I knew him personally, and he was a mighty fine man, and Mr. Tracey was in back of Mr. Parmenter and I was in back of Mr. Tracey, and this fellow still stood there. Well, I began to think and think and think, and I said to myself, 'That fellow looks familiar.' But I did not speak to him, I went right on my own business, you know, and I said, 'Well, I wonder where did I see that fellow?' Well, then, it dawned on me, and I said, 'Oh, goodness, I think that's the fellow that worked here in 1908, during the strike.' So when I went back to work that noontime I spoke to Frank Jackson, I mentioned his name

when I was in here before——

That is Frank Jackson—— —The superintendent now of the Braintree Shoe. [5111]

What was he then?—He was superintendent of Rice & Hutchins. In fact, I know he has been in here to verify my statement.

You see, we have not seen him.—No, I know you have not seen him, but I know Lawyer Reynolds has verified my statement. When I went back to work I said to Mr. Jackson, 'Do you know who I seen this noon time,' and he said, 'No, I haven't the slightest idea,' and I said, 'I think I saw this Sacco or whatever they call him.' 'Good Lord,' he said, 'I don't think so. I don't think you saw that fellow. I don't know where he is, but I don't think he has been around here since the day of the strike.' Then I went right upstairs and did not think anything more of it, forgot all about it until half past three that afternoon the whole factory was turned into a turmoil. It was our pay day the same as Slater's. I worked from where murder was committed, I don't know how many feet or how many yards, but I worked way back in the factory, in front of G Factory and this was committed in front of K Factory. When Mr. Reynolds came along with our pay he was shaking like that [illustrating]. I said, 'Why, Jim what is the matter?' 'Everybody is running, I am so scared I can't move,' he says, 'don't touch me,' he says, 'I am so upset myself,' he said, 'There has been the most terrible murder committed outside of the factory I ever heard of; it's cold blooded,' he said, 'Mr. Parmenter and Mr. Berardelli have been murdered.' I said, 'Oh, my God! Good Lord!' I don't say now those men done it, but I said, 'Whoever done that murder did not give anybody a chance to see them.' I wouldn't come out in front of you men and say I saw who done it. If Mr. Sacco was in that town that day he had a right to be there. I have a right to be here in the State House, and I am liable to be murdered after I go out of here, for God only knows what is going to happen. Mr. Hale knows I am here because he brought me here.

And that is all you know?—That's all I know. I don't say Mr. Sacco done it. I do not say it was him I saw that day.

You have told us all that you know?—Yes, sir. If you wish to ask me anything that was offered to me seven years ago, if you know anything about it, I am willing to tell you, and if not my lips are closed.

PRESIDENT LOWELL. That is all we wish to ask.

MR. THOMPSON. Is it worth while for me to cross-examine?

PRESIDENT LOWELL. That is for you to decide.

THE WITNESS. If I have wavered in this statement any different from what I told the Governor you will have to overlook it, because when I leave you I forget about it, I don't open my mouth." [5112]

When cross-examined Lottie Packard several times complained that her character was being attacked. While being asked about a letter she had sent the Governor she said: "What is the matter with my character? If there is anything that is against my character that is right, all right, but if

it is wrong I will take it up to the full extent of the law. I can prove anything I say. When I did not accept \$500. from Mr. Moore, the defence man, I must certainly be all right." [5113]

Another occasion arose when questioned about Sacco's presence in the factory:

"(By Mr. Thompson). What time did you say that Sacco first worked in the Rice & Hutchins factory, what year?—What is the idea of my coming up and talking to you when I come in here today to have my character overhauled? Has my character got anything to do with what I saw and what I heard?

PRESIDENT LOWELL. You will oblige the Committee by answering questions. We won't allow your character to be assailed.

THE WITNESS. My character is just as good as yours, or Sacco's, or Vanzetti's, or any of that gang that you have got down there and what they do. I will not allow my character to be overhauled.

PRESIDENT LOWELL. No, nobody is overhauling your character.

THE WITNESS. He has got my character in his hands there, and he is going after that." [5117]

The same thing occurred when she was asked to identify her signature:

"Don't ask me another question, I refuse to answer until my character is through being overhauled. You have no right to overhaul my character." [5120]

Mr. Ranney said she had not been used as a witness because the prosecution could find no record of Sacco's having worked at Rice & Hutchins' and because there were rumors of her immorality [5119]. At the conclusion of her testimony he repeated this statement, adding:

"it is quite obvious from her conduct here why we did not put her on, she would be almost uncontrollable in the courtroom." [5145]

When she was cross-examined about a statement she had made to Moore in 1920 she accused both Moore and his stenographer of having acted crookedly:

"You have nothing there that I said. Don't confront me with absolute crookedness. You will put them behind the bars if you go by that story you have got there, what he has got there. You have got this crooked Moore's statements there. How do I know this man here is taking down the right statements that I am giving here now. He may be an official court stenographer but how do I know anything about him?" [5125]

She admitted having said that there were two things that kept her out of the case, Mrs. Sacco's pregnancy and fear of Sacco's friends:

"—He had something powerful enough to keep me. I don't care anything about that.

Unfortunately we do care about this.—It is going to help to convict them and put them somewhere.

You told him that the two things that were keeping you out was the condition of Mrs. Sacco and you were afraid of his friends?—Yes. Anybody would be in sympathy of her. When a woman's husband is in jail and she is giving birth to two little twins I would have sympathy for her. If you were in jail I would have sympathy for your wife.

MR. RANNEY. That is not proper.

THE WITNESS. I know it, but he gets me all worked up.

Let us get our minds back on this paper. Then you told him about those two things, the condition of Mrs. Sacco and your being afraid?—Yes. I have always been afraid of those bandits because they will do anything, won't they?" [5132]

She claimed Moore had offered her a bribe to leave the State and said she had reported this to Officer Shea:

"THE WITNESS. He just asked me the same questions that you men have asked me about it, when I saw Sacco, when he worked in the factory, asked me if it was half past eleven in the morning, and when I said that one of the other men spoke up and said did I know Mrs. Andrews, and I said, 'No, I don't know Mrs. Andrews,' and he whispered something but he did not whisper so low but what I caught it, he said, 'Mrs. Andrews said she saw him at half past eleven.' 'Do you sell shoes in the factory?' I said, 'No. They do sell them but I don't sell them.' He said, 'I guess she is the lady that went to buy a pair of shoes. He tried to tell me Mrs. Andrews worked in the factory, but I didn't know her. He said, 'She knows you.' I said, 'How does she know me?' He said, 'I don't know, but I am pretty positive that she knows you.' She said you went by ahead of her that morning. I said, 'I didn't turn around to see who it was behind me. After I had told him my story the same as I have told you men about seeing him he said to me,—he brought these pictures out and he had some of them in a frame in the office, they were hanging up in the office that he had, and he showed me a lot of other pictures, and I was beginning to get dizzy, and you know when you get tired you get stubborn, and I said, 'Mr. Moore, please cut this thing short, it's getting late and I want to get out home, I am tired from the way you have questioned me. Don't show me those pictures; I don't believe you know who Mr. Sacco is.' I said, 'Those pictures mean nothing to do.' He said, 'That is Sacco.' I said, 'They might be to you, it isn't to me.' 'Then you know him?' I said, 'I never kept company with him or anything of the kind but I know he is the man that hit my foot.' He said, 'I wanted to know if your statement is right in that respect.' I said, 'Yes, it is.' Then when I got through I identified the picture. He said, 'Does this look like the machine that was in front of the factory that morning?' I said, 'Yes, it does.' He turned to the other gentlemen and they went into a corner and they talked there for a few minutes, I couldn't hear what they were saying, and Mr. Moore came back to me, and he said, 'You may go,' but he called this Mr. Mirra and he

said—— [5142]

Who said it?—Mr. Moore. He said, 'That statement ought to have been pretty good,' and he said, 'Don't you know it is pretty good.' If you gentlemen have got a bible here, or I will put my hand on the flag there, which I will do.

JUDGE GRANT. [Addressing the witness.] Go ahead.

THE WITNESS. He said, 'Your statements and your story sound pretty good. You identify the pictures all right.' He said, 'If you saw this picture a hundred years from now would you say it was the same picture?' I said, 'Yes.' He said, 'If you were called into court to testify would you identify the same picture?' I said, 'Yes.' He said, 'Very well then,' putting his hands in his pockets and walking up and down this way [illustrating]. He said, 'Would you accept \$500 to leave the State?' I looked right at him and I said, 'What, sir?' He said, 'Would you accept \$500 to leave the State?' I said, 'No, sir. Why should I accept \$500 to leave the State that I was born and brought up in? Why should I leave my State, because I was brought in here? Mr. Moore, I absolutely see now that I have been tricked,' and I said, 'Mr. Mirra, you came into Rice & Hutchins to find out what I had to say and to find out what I saw that morning, and you found that out and you brought it to Mr. Moore, and you brought me in here to Mr. Moore to take \$500 to leave my State.' I said, 'No, no, never. If you want to take that \$500 you take it, and don't call me in here again, don't do it, because if you do I will open up the case to the Judge and we will find out.' Now, Mr. Thompson, if you believe me or not, that is the truth, Mr. Moore offered me \$500, and, Mr. Thompson, here is my hand [witness holds out her hand] to seal my truth to my God.

(By Mr. Thompson.) You counted that money and you knew how much it was, did you?—No. I will not lie, he did not show me the money; I did not count the money; he just asked me if I would take it. Had I taken that \$500 and gone out of the State, you know, Mr. Thompson, it would have been wrong.

Did you see any money in his hand?—No.

You told that to the police and the State officials?—I told Mr. Brouillard and Mr. Shea, and they congratulated me on my stand.

That was long before the trial of the case?—Yes, sir, long before it was brought in.

You did not go before the jury and tell the jury about Moore's offering you money, did you?—No, sir. Everybody that was decent and respectable said that is why Moore never bothered me again. And this Mirra left the job and nobody has heard of him since, so I have nobody to prove that that \$500 was offered me in that place." [5143]

She said on further examination by Mr. Thompson: "That's why when Mrs. Andrews made this statement I used to tell the people he made the same offer to me." [5144]

She thought that she had not been brought into the case because

Moore didn't want it told that he had offered her money.

"By President Lowell: That is not the reason why the Government did not call you?"—"I do not think they knew it." Mr. Ranney, however, said that the Government did know it. [5144]

She testified that the second man she had seen was Vanzetti and that he had said something to Sacco about having to hurry to dig clams, also, that she had at the time told this to Moore. [5121, 5122]

She said she did not know this was Vanzetti until Mr. Moore showed her a picture.

"THE WITNESS. When I came up the street this man hollered across to this man that was Sacco and he said, 'Hurry up, there I have got to get through at half past three. I have some clams to dig.' If they going after clams, you wouldn't walk after clams.

Where did this man say he was going to sell his clams?—He did not say. He said, 'I have got to go and get clams at three o'clock.' I have got to go and give music lessons this afternoon, do you know when I am going to give the lessons? I have got to get lunch, do you know where I am going to eat? You have got my character sticking in your old crop that I am a low woman. I have got a chance as well as Sacco and Vanzetti to fight for my character. You don't know those murderers that committed that murder, and I don't.

JUDGE GRANT. Remember you want your luncheon.

THE WITNESS. I don't want any lunch, I have got lunch enough listening to this man here, he's good enough lunch for anybody.

Are you willing to listen to my question?—Ask it.

Doesn't that refresh your mind to have it suggested to you that at one time this man said he had to go down to Providence to sell clams?—I never mentioned Providence, unless I signed it, and was made to sign it. Oh, you don't know the whole story. I am not coming up here for the first time. I told the whole story seven years ago. Except for one man—well, I won't use no slang—that brought me to Mr. Sacco, and then he said I went there voluntarily. I did not go there voluntarily. I didn't come in here voluntarily. Why should I go for murderers? Why should I go for murderers or any other people? I did not come in here until I was brought in here." [5122]

The witness was then questioned at length about the statement she had given Moore in the course of which questioning the following took place:

"[Reading]:

'Q. What did he look like? A. I didn't see much of Vanzetti, he looked kind of short with a slouch hat on.'

THE WITNESS. Yes, an ugly, dirty looking thing. Don't worry, I have identified his picture and I will do it again.

You would like to see him executed?

JUDGE GRANT. Mr. Thompson, you are only irritating her.

I asked you if you would like to see Vanzetti executed?

MR. RANNEY. I object to that question.

JUDGE GRANT. What is the object of this?" [5125]

That question was not pressed by Mr. Thompson.

The witness referred to an episode which she said had happened at the factory in 1908:

"PRESIDENT LOWELL. The testimony is that he threw a last at the boy and hit her by mistake.

THE WITNESS. Yes; and Mr. Sacco became quite excited with me, and he thought it was a terrible thing; but no damage was done.

What did he do?—He threw a last at this little Denehy boy.

What did he do?—He hit me by mistake.

How big was the object that hit you?—A shoe last, Mr. Ranney.

How large? As large as mine?—No, no, or I would have had a broken ankle.

That episode is something that you remember having happened in 1908?—Yes, sir. I didn't really want to tell it. I didn't mention it to the Government for the fact I didn't want to hurt poor Mr. Sacco." [5138]

The statement taken by Moore was submitted to the Committee. In it she had said that the first time she saw Sacco was in 1915 [5146].

FRANK JACKSON, the factory superintendent referred to by Miss Packard, contradicted her testimony to the effect that she had told him about having seen Sacco before the shooting. He said she made no mention of the matter until after Sacco's arrest [5195].

Braintree's former chief of police, GALLIVAN, and the reporter, MORAN, testified before the Lowell Committee that Lottie Packard had told them a few weeks previously, while waiting to see the Governor, that she had made a mistake and that she had not really seen Sacco at all [5180, 5184].

Gallivan and Jackson also stated to the Committee that Lottie Packard was generally known to be unreliable and mentally unsound. Gallivan had known her from childhood:

"—She ought to be out in the Brookline Psychopathic Hospital. She is a nut. She is crazy, and she has been that way for years. She imagines things. [5173] . . .

Does she have delusions, is that what you mean?—I don't know what she has. Lottie Packard as a girl was a girl that associated with men ever since she was a little girl, and she was a mighty pretty girl, a pretty girl, and if there was any records kept by the Board of Health in Braintree you will find that there's lots of young men visited doctors on account of Lottie Packard. . . ." [5174]

Jackson had observed her daily in her work at the factory and had found her very accurate in that work, which was to carry things in need of repair from various departments to the stitching room. He thought she was not "all there" [5195].

ALFRED N. LABRECQUE, World War veteran and member of the Mas-

sachusetts Legislature, who had been a witness at the trial against the credibility of Mrs. Andrews, told the Lowell Committee that he had known Miss Packard when he was in the insurance business in Quincy:

"Did you observe her enough to form an opinion as to whether she was in her right mind or not?—I don't think she is mentally right, no, sir.

Tell us on what ground you base that.—She came into our office one Saturday night with her husband and would tell us one story, and another Saturday night she would come in and tell an entirely different story, so much so that she would come in my office so many times and tell so many irresponsible statements and she was taking up so much of our time that I told her I could not do anything for her. There was no use believing a woman of that character.

Which husband was that, the present one?—The present one.

Did she talk to you about giving concerts and being a musician?—Recently she met me in the street one day and I was with Mrs. LaBrecque, and she came up to me and threw her arms around my waist and says, 'If you know any children that want to be taught music send them to me because I am in the music business.' So I quickly started moving along with Mrs. LaBrecque, I was on Hancock Street and I felt a little embarrassed." [5159]

GARDNER JACKSON, a member of the Defense Committee, testified to having tried to check up Sacco's various employments during 1908. He found a former landlady of Sacco's, Mrs. Calzone, of Milford, who told him that when Sacco came there in 1908 he had worked for three months as water boy for the Cenedella Construction Company, then as pick and shovel man. She thought he had then gone to the Draper Corporation in Hopedale. Jackson visited this concern and interviewed a foreman, Charles Larkin. Larkin remembered Sacco quite distinctly as having worked there in the latter part of 1908 or early in 1909. The company, however, had no record of his employment. That Sacco had had a job there in the scrap room of the foundry was confirmed by a fellow worker, Peter Finticchio. Jackson next traced Sacco to the Milford Shoe Company. These people on account of changes in ownership, also had no records, but Mr. F. W. Frost, the office manager, told Jackson that he remembered Sacco's learning his trade there under Mr. Kelley and working continuously from 1908 to 1917. [5239, 5240]

No confirmation was forthcoming of Miss Packard's statement that Sacco had been employed by Rice & Hutchins in 1908. Nor was there any trace of his having worked there at any time except the few days in 1918, when he was there under an assumed name. Miss Packard did not claim to have seen him then.

6. *At the Inquest* held in Quincy on April 17th, 1920, seven witnesses testified who were not called at the trial or later. Whether any of these persons was ever taken to see the defendants does not appear. The minutes of the inquest became available for the first time to counsel for the defendants just before the conclusion of the Lowell Committee's hearings. [5305]

MERLE L. AVERILL, a salesman for E. C. Hall, who had been in the cobbler shop of Berardini,¹ rushed to the street after hearing shots and got a glimpse of the face of the man leaning over the side of the escaping automobile. He described it as "terribly white; whether from fright or excitement I don't know, or whether it was natural I don't know." [403*]

JOHN MANNEX, an employee of Slater & Morrill, said he had looked out of the window, seen a man jump from a small closed car that kept right on going and then seen the big car come along. He had not witnessed the shooting and could not describe the man he had seen. [436*, 437*]

SAM M. AKEKE, an employee of Rice & Hutchins, saw the shooting, said the two criminals he saw were Italians and looked alike, were of medium complexion and wore dark clothes but no hats [447*]. Asked if he could identify them he said: "I could not identify them. I was excited and could not sleep that night." He said he had been about twenty feet from the men. [448*]

PATRICK J. WALSH, foreman for Rice & Hutchins, heard the shooting and saw the car coming up with two men in it, the driver "stocky built, full face, lighter than the man who was standing up with the gun in his hand," [448*] the other "awful dark with thin features." He said he thought he could identify these men if he saw them again and believed he had seen the same car once before, about a month earlier, with one of the men in it. [449*]

RALPH L. DEFORREST, a shoemaker, unemployed at the time of the shooting, had noticed two strangers standing around in the Square at about two thirty and had seen them walk along Pearl Street to the railroad station where he had also observed a Buick car. Both the men and the car had disappeared while the witness was in the toilet in the station but a few minutes later he had heard shots and had then seen the same car as before come over the crossing. He described the driver as "light complected. Had on an army coat . . . smooth face . . . thin, pale cheeks drawn in, either from severe illness or fright . . . he looked like a dope fiend" [453*]. The witness thought one of the other men was Irish, that both had dark hair, "one with the latest kind of hair cut up here" [454*]. He said he could identify the chauffeur and the two men he had seen in the Square: "The way they looked at me was enough." [455*]

DONALD WIGHT, bank teller in the Braintree National Bank, situated about two miles from South Braintree, said that at about quarter past two on the day of the shooting two men came into the bank for change: "As they walked into the bank we three felt that they were men to be watched, in fact we all saw that guns were ready to stop anything that was started. They had that character you could pick out in a thousand" [455*]. After hearing of the robbery the witness had had the thought that these men might have been of the gang. He said one of them was Italian, dark, with dark, though smooth-shaven, beard;—the other, Irish, with face the color of cigarette stain and a front tooth missing. [456*]

JOHN C. HUBBARD, expressman for Shelley Neal, noticed a car passing his house on the line between Holbrook and Braintree going toward South Brain-

¹ See p. 284.

tree at about two thirty on that day and saw the same car coming back at about twenty minutes past four. On the first occasion the engine was skipping; on the second it was running properly. Both times he had seen three men in the car; he thought he could remember two of them [459*]. He described the driver as not stocky, possibly Swedish; one of the other men had a dark mustache. He was not sure whether or not he would be able to identify these men if he saw them again. [460*]

g. The Report of the Lowell Committee

The Lowell Committee did not discuss the identification testimony relating to Sacco given at the trial except to say:

"The case has been popularly discussed as if it were one turning mainly upon identification by eye witnesses. That, of course, is a part, but only a part, of the evidence. As with the Bertillon measurements or with finger prints, no one measure or line has by itself much significance, yet together they may produce a perfect identification; so a number of circumstances—no one of them conclusive—may together make a proof clear beyond reasonable doubt. In the case of Sacco the chief circumstances are as follows: He looks so much like one of the gang who committed the murder that a number of witnesses are sure that he is the man. Others disagree; but at least his general appearance is admitted even by many of those who deny the identity to resemble one of the men who took part in the affair." [5378w]

The Committee referred briefly to the four witnesses who had identified Vanzetti:

"Now there are four persons who testified that they had seen him;—Dolbeare, who says he saw him in the morning in a car on the main street of South Braintree; Levangie, who said he saw him—erroneously at the wheel—as the car crossed the tracks after the shooting; and Austin T. Reed, who says that Vanzetti swore at him from the car at the Matfield railroad crossing. The fourth man was Faulkner, who testified that he was asked a question by Vanzetti in a smoking car on the way from Plymouth to South Braintree on the forenoon of the day of the murder, and that he saw him alight at that station. Faulkner's testimony is impeached on two grounds: First, that he said the car was a combination smoker and baggage car, and that there was no such car on that train, but his description of the interior is exactly that of a full smoking car; and, second, that no ticket that could be so used was sold that morning at any of the stations in or near Plymouth, and that no such cash fare was paid or mileage book punched, but that does not exhaust the possibilities. Otherwise no one claims to have seen him, or any man resembling him who was not Vanzetti. But it must be remembered that his face is much more unusual, and more easily remembered, than that of Sacco. He was evidently not in the foreground." [5378z]

This statement about the smoking car does not seem to find support in the evidence. The assistant train master of the New York, New Haven &

Hartford Railroad, Daniel F. Ahearn, was asked before the Lowell Committee to comment on Faulkner's description of the car, which was read to him. He said that the only part of the description which was correct was the existence of a small seat backing on to the toilet. [5224, 5225]

The Committee said about Gould:

"He certainly had an unusually good position to observe the men in the car; but on the other hand his evidence is merely cumulative, the defendants having produced a large number of witnesses to swear to the same thing, and it is balanced by two other new witnesses on the other side. One is Mrs. Hewins, who stated to Mr. Thompson, as appears in one of his affidavits, that the bandit car stopped to ask the way at her house and that Sacco was driving it. Sacco, if guilty, may have been doing so at that moment, or she may have mistaken whether he was behind the wheel or in the other place on the front seat. The other witness is Mrs. Tattoni,¹ formerly Lottie Packard, who claims to have known Sacco when he was working in the factory of Rice & Hutchins where she also worked, and to have seen him at South Braintree on the morning of April 15th on Pearl Street. The woman is eccentric, not unimpeachable in conduct; but the Committee believe that in this case her testimony is well worth consideration." [5378o]

The two persons referred to were in no real sense new witnesses, Mrs. Hewins having been under subpoena at the trial and Miss Packard known to the prosecution. No explanation was ever given of the failure to call Mrs. Hewins.

Whatever conclusions may be reached regarding the reliability of the numerous identification witnesses on both sides, there should at least have been no doubt about the utter absurdity of Lottie Packard. In the first place, her statement that she had seen Sacco at work at Rice & Hutchins' in 1908 is flatly contradicted by all the known facts of Sacco's life. That she noticed any one at all on the morning of the crime is improbable. Jackson denied her statement to the effect that she had spoken to him before the shooting or, indeed, until after the arrest. Her account of having seen Vanzetti, too, as well as her report of his remark in regard to digging clams, seems the purest fancy. Obviously this woman had picked up bits of information about the crime and, in her talkative way, and with a view to becoming important and receiving attention, had made some of this information her own. It would be very remarkable if she alone of all the eye witnesses should have seen both Sacco and Vanzetti.

h. Summary

As has already been pointed out (p. 308) four witnesses identified Vanzetti and seven others picked out Sacco. Only one of these claimed to have witnessed the actual shooting, and he, Pelser, had told both sides before the trial that he could not identify. His testimony was also contradicted by a number of his fellow workers. All the other eyewitnesses of

¹ Tattillo.

the shooting either, like Bostock and Wade, refused to identify or said that neither defendant was one of the men involved. Three witnesses claimed to have seen Sacco in the escaping car: Splaine, Devlin and Goodridge; two to have seen Vanzetti: Levangie and Reed. The opportunities for careful observation of these witnesses was not great. All except Reed either qualified their identification at some time or were reported by others to have said they could not identify. Other witnesses with as good or better opportunities for observation refused to identify or appeared for the defense.

Five witnesses placed the defendants in South Braintree before the shooting. Heron was the only one to make his identification soon after the crime. Not one of these witnesses had any special reason for having noticed his man, except, perhaps, Faulkner whose recollection of the kind of railroad car he had been riding in was incorrect, and Mrs. Andrews, whose testimony was contradicted by a very considerable number of persons and who herself retracted it for a time at least. Not one of the witnesses against Sacco was at all times consistently positive in the identification.

It is not surprising that in 1924 Judge Thayer expressed the opinion that the verdicts did not rest on the testimony of the eyewitnesses.

II

THE RELATIONSHIP BETWEEN SACCO'S PISTOL, THE FATAL BULLET AND THE SHELLS

- a. The Genuineness of the Mortal Bullet.
- b. Captain Proctor.
- c. Did the Fatal Bullet go through Sacco's Gun?
- d. The Cartridges found in Sacco's Possession.
- e. Summary.

THE prosecution claimed that one of the bullets found in the body of Berardelli and one of the shells found near the scene of the crime had been fired through the Colt automatic pistol which Sacco was carrying when arrested.

Six bullets were taken by the doctors out of the bodies of the two murdered men and marked by them for purposes of identification. One of these, the one which caused the death of Berardelli, was a Winchester, marked by Dr. Magrath on its base by three straight lines. It was called bullet No. 3 at the trial, and introduced in evidence as Exhibit 18.

Four shells were picked up at the scene of the crime by an eyewitness, but not marked. One of these was a Winchester. It was known as Fraher No. 4, or F4.

In his opening to the jury, on June 7th, 1921, Mr. Williams, Assistant District Attorney, claimed that the mortal bullet had been fired through a Colt pistol.¹ Yet, although he referred to Sacco's possession of such a Colt, he did not at that time claim the bullet had been fired from that pistol. Nor did he make any claim about the shells found at the scene of the crime. Mr. Williams mentioned that Sacco when arrested had in his possession thirty-two cartridges. That six of these were Winchesters, or that there was any resemblance between these Winchesters and the fatal Winchester, was not at that time remarked.

At some time during the early stages of the trial, perhaps while the jury was being empanelled, Mr. Moore asked Mr. Katzmann whether he intended to offer proof that any particular bullet had come from any particular gun and was privately assured that no such claim would be made. Then Moore requested permission to have tests made with Sacco's pistol to make assurance doubly sure and enable his experts to testify this pistol had not fired any of the bullets. The right to examine the bullets and the pistol had been asked for and granted on the day the jury took its view of the scene of the crime [50]. It does not appear in the record when Moore asked for an opportunity to have the experts fire through the pistol; but the tests

¹ See p. 47.

were held at Lowell, apparently on June 18th, 1921 [894, 873]. Thereafter, and before Van Amburgh testified on June 21st, Katzmann told Moore that he was withdrawing his previous assurance "in the light of the result of the experiments." [5319]

Expert testimony was accordingly offered by both sides regarding the possibility of this mortal bullet's having passed through Sacco's pistol. And after the trial new experts made voluminous affidavits on the same subject. Captain Proctor, of the State Police, who had testified at the trial for the prosecution, gave the defense an affidavit explaining his testimony. It was claimed by defendants' counsel that Proctor, at the trial, had misled the jury and the Court and that the district attorney or his assistant had been parties to the deception.

Some time after the trial it was noticed that the markings on bullet No. 3 differed from those on the three other bullets taken by the same doctor from the body of Berardelli. For this reason and others counsel for the defendants for the first time before the Lowell Committee suggested that the bullet used at the trial might have been a substitution.

That a similarity existed between this fatal Winchester bullet and the six Winchesters found on Sacco at the time of his arrest was noted by the Lowell Committee in its report. No mention of the fact had been made during the hearings, or on any earlier occasion.

Four important questions are thus presented:

- a. Was Exhibit 18 a substitution for the fatal bullet taken from Berardelli's body by the doctor and marked by him?
- b. Did Proctor's testimony at the trial mislead the Court and jury?
- c. Did the fatal bullet and the shell come from Sacco's pistol?
- d. Did the other Winchester bullets found in Sacco's possession throw any light on the vital issue?

As a number of technical terms relating to pistols and bullets will be mentioned hereafter, a brief description of them may be helpful. The inside of the barrel of a pistol is cut in six grooves having a twisting, screwlike motion. They give direction to the bullet. In most makes of pistols these grooves send the bullet in a right-hand direction, and are said to give a right "twist"; in the Colt, the twist is to the left. The grooves of the barrel make raised ridges on the bullet as it passes out. These are sometimes called "lands." The parts of the barrel between the grooves are called the lands of the pistol, and the cuts made in the bullet by these are known as the grooves of the bullet. The measurements of the grooves and lands on a bullet and on the pistol through which it has been fired, and particularly those of several bullets fired through the same pistol, should, under microscopic examination appear identical. All the markings are most pronounced near the bullet's base. Imperfections inside the barrel of the pistol may also mark the bullet. Such marks are called "pitting." Often they are due to accumulations of rust. [See photographs, 3732 l, m, n, s, t]

When the pistol is fired the hammer drives the firing pin against the cap in the center of the shell and makes an indentation which is intended to be

in the center of the cap, but which in some cases is not exactly there, and is in that event described as being "off-center." Bulging of the rim around the firing-pin indentation, due to unevenness of pressure and difference in hardness of metal, is known as "flow back," or "set-back," the term deriving from the fact that the metal of the cap is drawn into the chamber or mouth of the firing-pin hole. [See photographs, 3732 j, m]

Marks in the form of slightly raised lines are often found on the cap and on the rim surrounding it. These come from the impact of the harder metal of the pistol and are a reflection of certain file marks on the pistol itself. It is claimed that such imprint makes it possible to determine whether a particular shell has been fired through a particular pistol. The part of the pistol on which these marks appear is called the breech block. It is a flat piece of metal through which the firing-pin moves back and forth, passing freely along a projecting cylinder known as the bushing. [See photographs, 3732 b, j, r]

On the side of the shell cuts sometimes appear which are due to the action of the "ejector," a mechanism for expelling the used cartridge [See photographs, 3732 b, c, k]. The location of such marks is considered another aid to the identification of both bullet and pistol.

a. *The Genuineness of the Mortal Bullet*

The Lowell Committee made the following statement:

"Before the Committee Mr. Thompson suggested that the fatal bullet shown at the trial as the one taken from Berardelli's body, and which caused his death, was not genuine; that the police had substituted it for another, in order by a false exhibit to convict these men; but in this case, again, he offered no credible evidence for the suspicion. Such an accusation, devoid of proof, may be dismissed without further comment, save that the case of the defendants must be rather desperate on its merits when counsel feel it necessary to resort to a charge of this kind." [5378m]

The suspicion here mentioned had been expressed in a passing statement by Messrs. Thompson and Ehrmann in the brief submitted to the Advisory Committee [5373]. It was developed at length by Mr. Ehrmann upon the oral argument [5317 and following]. He pointed out that bullet No. 3, (the only Colt bullet), had been marked by a clumsier hand and with a blunter instrument than the other bullets taken from Berardelli's body; also that the man claimed by the prosecution to be Sacco had been seen to pump successive shots straight into Berardelli, wherefore Ehrmann argued that more than one of his bullets must have taken effect:

"MR. EHLMANN. You have here a number of bullets supposedly fired by Sacco, from Sacco's pistol, into Berardelli, and yet only one bullet, admittedly, could have been fired through Sacco's pistol.

THE CHAIRMAN. You must not suppose we are assuming that, because we do not think so. That is not the way I understand the testimony.

MR. EHLMANN. The testimony will be what it is when you look at it.

THE CHAIRMAN. Certainly. One man said that he saw a man shooting several shots into Berardelli and then running across the street.

MR. EHLMANN. That was not one of the witnesses who identified Sacco." [5318]

There was at this point discussion about the evidence but no statement by the Chairman as to his reasons for disagreeing with the defendants' counsel.

Mr. Ehrmann called attention to a matter he had only recently discovered: that Mr. Katzmänn had told Mr. Moore before the trial that the prosecution would not claim any particular bullet had come from any particular gun, and that after the experiments at Lowell Katzmänn had withdrawn this statement [5319]. These facts indicated, Mr. Ehrmann contended, that there had been no Colt bullet in existence before the Lowell experiments; and he argued there was no evidence that prior to that time any one had referred to a Colt bullet [5320]. Mr. Ranney, in answering the contention, pointed out that Dr. Magrath, he who took the bullets out of Berardelli's body and marked them, had identified them at the trial. He said he was willing to bring Magrath before the Committee to testify that the mark on bullet No. 3 was his mark, characterized Ehrmann's argument as pure speculation and called attention to the fact that it had never before been made [5339]. Dr. Magrath did not, however, testify before the Lowell Committee.

During the hearings the subject of this bullet had been brought up on cross-examination of MR. KATZMANN. Katzmänn said the eyewitnesses testified that one of the bandits had killed Parmenter and the other, Berardelli. He also said that three of the bullets found in Berardelli's body had come from a pistol not Sacco's. He did not remember what explanation he had made to the jury of the fact that only one of these bullets had come from Sacco's pistol, nor did he remember how the bullets had been marked. He had never noticed any irregularity on the marks of bullet No. 3. The question of substitution had never to his knowledge been raised before [5038] and he thought there was evidence at the trial that more than two men had fired shots. [5039]

THOMAS F. McANARNEY, one of Vanzetti's trial counsel, testified before the Lowell Committee that he did not recall that the marks on the bullets had ever been called to his attention except insofar as this appeared in the record nor that the question of substitution had ever been raised. [5186, 5187]

WILBUR F. TURNER, who had taken the photographs used by Hamilton on the motion for a new trial, testified before the Committee that he had recently examined the marks on the base of the bullets taken from Berardelli's body. He said there was so tremendous a dissimilarity in the marking of No. 3 and that of the others that it looked as though a different instrument had been used for the former bullet [5225]. At the conclusion of his testimony Mr. Lowell inquired whether there was any reason for supposing Dr. Magrath had marked the bullets with the same instrument. He pointed out that he had not gotten the three bullets out of the body at the same instant. [5228]

As will be seen, the identification at the trial by Dr. Magrath was purely formal. However, the existence of a Colt bullet before the Lowell experiments is established by Mr. Williams' reference to it in his opening. It should be noted that at the inquest held on April 17th, 1920, before the arrest of the defendants, DR. FREDERICK ELLIS JONES, who was present at the autopsies, described the six bullets taken from the bodies of the two victims. He called them "identical," saying that "they were all fired by the same type of pistol," and adding, with reference apparently to all the bullets, that "it looked like a Colt cartridge but may not have been a Colt revolver that it was fired from." However he said he had not examined the Berardelli bullets and did not feel competent to discuss bullets. [414 *]

Mr. Ehrmann based his argument that there had been a substitution in part on the supposition that Katzmann would not have failed to claim Sacco's Colt had fired the mortal bullet had he known this had been fired through a Colt pistol. It is more likely, however, that Katzmann's original position was due to Proctor's unwillingness to express a definite opinion, as will be discussed hereafter. Ehrmann seemed to think that if there was a substitution it had been caused by Captain Proctor or by some one in his office [5320]. As already noted Ehrmann commented on the curious fact that only one of the bullets could have been fired through a Colt and yet the man who was said to have used this pistol was described as firing many shots point blank at Berardelli. A certain amount of mystery clings to this subject. It may, therefore, not be amiss to discuss the testimony relating to the finding of the bullets and to the shooting itself.

DR. GEORGE BURGESS MAGRATH, who operated on Berardelli, stated that, as he found each bullet in the body, he marked a Roman numeral with the point of a needle on its base [112]. The bullet found in the fourth wound had been marked No. 3. It was approximately of 32 caliber and slightly flattened on one side [117]. Where it entered the body it had made an angle of about fifty degrees below horizontal.

Upon being shown some bullets Dr. Magrath stated that he identified one of these as that on which he had placed three vertical marks [118]. This was placed in evidence as Exhibit 18. The witness described it as a jacketed bullet of a size consistent with 32 caliber [119]. The other bullets were separately shown him and he described these also as jacketed bullets consistent with 32 caliber. [119, 120]

Magrath was unable to say how close to the bodies the pistols which fired any of the bullets had been, for powder marks show only at an average distance of ten inches [122]. Bullet No. 3 had entered at nearly right angles to the skin. The witness did not think the body could have been squarely on its back when the bullets reached it, since they had hit the back first. [128]

He was asked whether the bullet could have been fired by someone standing in front of Berardelli when the latter had had one or both knees on the ground and was leaning forward [129]. Although the record shows an affirmative answer the question was excluded after objection by the de-

fendants. [132]

At no time was Dr. Magrath's attention particularly directed to the marks on the bullets nor was any comparison of the bullets made. On the contrary each was restored to the envelope in which it had been kept before the next one was taken out [119, 120]. There was no direct testimony at the trial as to what Dr. Magrath had done with these bullets; but it would seem he turned them over to Officer Scott or to Captain Proctor. At any rate, the latter had them in his possession until the trial. [5038]

The two bullets from Parmenter's body were described as 32 caliber, steel jacketed. One had been taken out of the body by Dr. Nathaniel S. Hunting and turned over to Scott [133]. The other, found on the floor of the operating room by a nurse and given by her to Dr. Jones, had likewise been entrusted to Scott. [134, 135]

All six bullets were at the trial shown to CAPTAIN WILLIAM H. PROCTOR, of the State Police, who had been active in the conduct of the investigation after the crime. He testified that bullets 1, 2, 4, 5 and 6 had been fired through a Savage automatic pistol [890-893]; that bullet 3 must have been fired through a Colt because it showed a left hand twist [893]. (Dr. Magrath had not been asked about the twist of any of the bullets.) Proctor further testified that in his opinion all five Savage bullets had been fired from the same pistol. He based this judgment on the similarity of their markings [896, 897]. He was not questioned in regard to the origin of these bullets.

The precise nature of his opinion and that of the other experts on the vital question whether Bullet No. 3 had been fired through Sacco's pistol is being here passed over since it is to receive separate treatment and does not affect the question now under consideration.

CHARLES VAN AMBURGH, the other expert for the Government, received the six bullets from Captain Proctor [912]. As had Proctor, so he also stated that No. 3 had been fired through a Colt [916] and the other five, from the same Savage automatic pistol; he likewise relied for his conclusion on markings on the bullets. [917]

Defendants' expert, JAMES E. BURNS, testified that the bullets other than No. 3 had been fired from a Steyr, 765 mm. pistol which corresponded to a 32 caliber [1415]. They might also, he said, have been fired through a Savage or a Walther [1422]. On direct-examination he was not asked whether these had all been fired through the same gun, but Mr. Katzmann asked him his opinion on the subject. He stated it was impossible to tell whether or not they had been fired through the same gun although he had examined them carefully. He was asked to look at certain markings and claimed these were not the same on the various bullets. [1433]

The defendants' other expert, J. HENRY FITZGERALD, was asked nothing about the five bullets. [1464-1482]

On the fifth supplementary motion for a new trial an affidavit was made

on behalf of the defendants by ALBERT H. HAMILTON which was sworn to on October 15th, 1923 [3635]. He compared the five so-called Savage bullets with five he had discharged through a 32 Savage automatic pistol and concluded that none of the bullets used at the trial had been fired through a Savage. He gave a number of reasons for his conclusions and referred to photographs of both sets of bullets [3626, 7; 3732c]. His opinion was that they might have been fired through a Harrington & Richardson 32 automatic pistol [3627]. Nothing was said in his affidavit as to whether they had come through the same gun although the statement was made that they had come from the same make of gun [3626]. There was no discussion of this subject either in the affidavits submitted by the Commonwealth or in Judge Thayer's opinion denying the motion nor on the appeal.

From the testimony of the experts for the prosecution one would expect to find the eyewitnesses of the shooting describing one bandit who fired at both Parmenter and Berardelli, and another who, using Sacco's pistol and arriving as Berardelli was already on the ground, fired one fatal shot at him. Some such description was given by Mr. Williams in his opening to the jury.¹ He stated that the attention of the victims was gotten by the first man on the fence, so that the other man shot two or three shots into Berardelli and one into Parmenter [67] and that, as Berardelli fell on his knee, a short, swarthy bandit who had lost his cap stood in front of him and fired two shots at Berardelli while he was prostrate. This bandit, Mr. Williams claimed, was Sacco [68]. A similar but less definite description was given by Governor Fuller in his report.

"The first shot laid Berardelli low in the roadway, and after Parmenter was shot, he dropped the money box in the road and ran across the street. The money could then have been taken but the murderers pursued Parmenter across the road and shot him again, and then returned and fired three more shots into Berardelli, four in all, leaving his lifeless form in the roadway." (5378g)

It is necessary to consider whether these descriptions are consistent with the testimony of the eyewitnesses to the shooting. They were: Bostock, Wade, Nichols, McGlone, Langlois and Pelser on behalf of the prosecution; Iscorla, Cerro, Gudierres, Foley and Carter on behalf of the defendants.

JAMES F. BOSTOCK was walking down Pearl Street and had just passed Parmenter and Berardelli going up, [187] when he saw a bandit fire at Berardelli:

—"As I looked down there, this Berardelli was on his knees in a crouched position as though he was guarding with his hand over his head, as though he was guarding himself, and this man stood off.

You can get down in front of the jury, if you want to and show that Berardelli was in what position, now?—Berardelli stood as though he was in a crouched position, this position [indicating]. This other man stood,

¹ See p. 39.

the same as if he stood there [indicating], closer to him than that was to him; I shouldn't think, when he fired, that man was——

You haven't told us that he fired yet.—He stood in that direction and fired at him almost as if the man was touching him when he fired at him. [188] . . .

Where was Parmenter and where was the other man you say was doing the shooting?—Parmenter had left and started across the street in that direction [indicating].

You say 'in that direction.' At what angle with the fence we have been talking about?—Well, the fence, if this was the fence [indicating], Parmenter started to walk in this direction [indicating] very slow, and as he got probably twenty-five or thirty feet, he started to go down, and somebody caught him. When he started to go down there was a stone and grass place and a stone step, and as he started to fall somebody helped him and lowered him. I could not tell who it was.

Tell us what either of the men you say were doing the shooting did after you had turned around and how many shots, if any, you heard fired?—Well, I couldn't say. I should say there was probably eight or ten shots.

What did you see this man you saw standing over Berardelli did after that?—Why, he stood there over him. He shot, I should say he shot at Berardelli probably four or five times. He stood guard over him." [189]

Bostock said the other bandit had been about five or ten feet from Berardelli, looking down the road as if beckoning, and that then the automobile had come up. He had seen another man get out of the car or off the running board and help these two men put the boxes into the car. [190]

He testified further:

"How many shots did you see the man who was standing over Berardelli fire?—He fired, one, two, three, why, I should say he fired five, and he fired two at me.

And how many shots, if any, did you see the second bandit fire, the other man who was standing there with the paymasters?—Why, I should say he shot probably two, I should say he shot about the same number.

In which direction, then, did he shoot, as far as you saw him?—He shot at Parmenter twice as he stood in front of him. As Parmenter walked across the street, he shot twice where he was going, to his back.

Any other shots from him?—Not that I could see.

Did you see any shots from the man you described as the third bandit?—No, sir." [191]

Bostock thought the man who was shooting Berardelli reloaded his gun [194]. He was unable to identify the defendants. [195]

LEWIS L. WADE had just filled an automobile with gasoline directly in front of Slater & Morrill's factory [202] when he saw Berardelli in a crouching position and Parmenter running. He saw a man shoot twice at Ber-

ardelli [203]. He did not see the other bandit do any shooting but he had heard two shots before he looked up:

"Did you see that man you just described do any shooting?—No, sir.

How many shots did you see the man in front of Berardelli fire?—Two or three. I think it was two.

How many shots did you hear fired before you looked up to see what was going on?—Two.

How many shots in all did you hear fired?—About five." [211]

Wade at one time had thought Sacco was the man who shot Berardelli [205] but he changed his mind and became uncertain because a few weeks before the trial he saw a man who resembled the bandit.

ANNIE NICHOLS, from the kitchen of her house near the excavation for the restaurant, saw a man chase Parmenter across the street and put two shots into him and then heard a shot from behind the pile of bricks [257]. Before the shooting she had seen one of the men on the fence speak to Berardelli and then chase Parmenter. She saw no shots fired at Berardelli but saw the second bandit move towards him when he was lying on the ground. [258]

JAMES E. MCGLONE was driving a drag taking stones out of the excavation. He heard some shots fired and saw a fellow hold the guard by the shoulder and fire a couple of shots:

"Now, you place me just the way Berardelli was there.—He was up against the fence, and this fellow had him by the shoulders. He had a black pistol in his hand, flat on both sides. There was a couple of shots he fired when he held him this way. I saw him going down like that.

Who do you mean by 'him'?—Berardelli going down like that.

How was he facing when he went down?—He was facing towards me, across the street.

As I am facing now?—Yes.

Show the jury how he went down?—He went down like that [illustrating].

At that time where was Parmenter?—Parmenter was coming this way across the street.

How far was he from Berardelli when you saw the bandit have hold of Berardelli?—I should say about twenty feet.

[The witness returns to the stand.]

Did you see any other bandit near the scene at that time?—No, sir.

How many men did you see there, that you saw in the bunch up against the fence?—I saw three at the time.

Who were they?—Two bandits and this Berardelli.

There were two there and Berardelli?—Yes, two and Berardelli.

At that time you say Parmenter was coming across the street?—Yes.

What did you see the other bandit, not the one that had hold of Berardelli, do,—the other one?—He started with a black bag." [268]

McGlone said he had seen no shots fired at Parmenter [272]. He could not say whether the men he had seen were the defendants. [276]

EDGAR C. LANGLOIS saw the shooting from a window on the second floor of the Rice & Hutchins factory. He saw two dark men firing at Berardelli, one in back and one in front [279]. He could not tell how many shots were fired and did not see Parmenter until the latter was picked up:

"There were two, as I understand it?—Two men, both were firing rapidly. What kind of a gun did each one have?—I do not remember.

You spoke of one. Do you think both were the same kind?—Both seemed to me the same kind, rapid-firing.

Do you remember at what level they held those guns?—In this way [indicating], just about like this [indicating].

About that level. You are raising your arm to a point a little below the level of your shoulder. Is that it?—Just exactly as I came away from——

I say, you are raising it to a little below the level of your shoulder.—You say I raised it?

I say, you raised your arm to a point which is a little below the level of your shoulder?—Yes.

I am simply trying to get this in the record.—Yes.

Do you know how many shots you heard or saw while those men were in that position?—I do not remember.

You say you went back to telephone?—I did.

How long were you away telephoning?—I did not time myself. I ran, sir.

Can you estimate, simply for our benefit here?—A minute or two.

And you came back to the same window?—Yes.

Now, what was the position of the actors in this scene when you got back?—I just glanced down. They were both firing and then I looked back, pushed my help back.

Where was Berardelli when you got back?—The same place.

Standing up?—Yes, well, just creeping down.

When you say 'creeping down'—— —Lowering down, slowly.

Sagging, you mean?—Sagging down.

Had he changed his position on the sidewalk?—No, sir.

Had the bandits changed their general position?—No, sir.

Did you see Parmenter at that time?—No, sir.

Did you see Parmenter at any time?—Just when they picked him up." [281]

He saw one of the men fire back at Berardelli from the automobile [282]. He, too, was unable to identify the defendants. [288]

LEWIS PELSER, on the first floor of the Rice & Hutchins factory, heard three shots, then opened the window where he was working and saw a bandit put the last of four shots into Berardelli [292]. He saw no one else and only saw one shot fired [293]. The man he saw was "a dead image of Sacco" [294]. He saw Parmenter fall after the same man had sent a bullet towards him. [295]

PEDRO ISCORLA, a Spaniard working on the excavation, saw a light man shoot the paymaster and a dark man shoot the police officer [1097]. These were not the defendants [1098]. The man who shot the paymaster shot him two or three times and followed him across the street [1100]. That man did not fire any shots at the policeman [1101]. Only one man shot the policeman and he fired about seven or eight shots. [1102]

HENRY CERRO, another laborer at the excavation [1105], saw a light man shoot someone [1106]. There were two shots fired [1109]. The man who was killed was going across the street and the man who fired was neither of the defendants [1110]. The witness later learned that the man killed was the paymaster. [1112]

SIBRIANO GUDIERRES, another laborer at the excavation, saw two different bandits, one light and one dark, neither of them a defendant, each shoot a different man [1113–1116]. Several shots were fired. [1119]

WILLIAM GIBSON FOLEY, a chauffeur working at the excavation, [1589] saw two men whom he could not describe shoot [1593, 1594]. He heard a shot fired by one of the bandits at one of the men while crossing the street. [1598]

EDWARD CARTER, who was in the Slater factory, saw four men at the time of the shooting but did not know what was going on. [964]

"Did you see any of it?—Well, I couldn't say that I saw the shooting. I saw a man drop on the ground; I didn't know whether he was shot or somebody knocked him down.

Did you see anything else in the neighborhood where the man dropped on the ground?—I don't think I did.

How many men did you see,—more than one that dropped on the ground?—I didn't stop to count them, because I thought first when I saw it it was a crowd of boys." [964]

On cross-examination, however, Carter admitted he had testified at the inquest on April 17th, 1920, that a man had stepped out of the car and had struck Berardelli down [967]; he said the sun had been shining in his face at the time and that he had not seen Parmenter. [968]

At the inquest held on April 17th, 1920, Wade, Nichols, McGlone, Langlois and Carter testified. MRS. NICHOLS said that a short, stout man, who had stopped Berardelli at the fence, must have actually killed him instantly [396 *] and that the same man chased Parmenter and put two shots into him [398 *]. Later she said that both the men who were at the fence fired at Berardelli [400 *]. MCGLONE's testimony was practically the same as at the trial [420, 421 *], and WADE said that one man shot twice at Berardelli and two others went after Parmenter [441 *]. He felt very certain that the bandit and Berardelli had known each other [444 *]. LANGLOIS' testimony was that two men fired at Berardelli as fast as they could [445 *]. CARTER, in addition to giving the testimony about which he was cross-examined at

the trial, also said there had been two cars, and that he thought the man who shot Berardelli had got out of the first car to save the bandit who was running with the money to the second car [434 *]. That there were two cars present was also testified to by a man named Mannex. [436 *]

To sum up: Bostock saw two men, one who shot four or five times point blank at Berardelli, a different one who shot twice at Parmenter. Iscorla and Gudierres both saw two, each of whom shot at a different man several times. Wade and McGlone saw one man (who apparently looked like Sacco) firing two shots at Berardelli. Pelser saw one man fire the last of four shots at Berardelli and the same man shoot at Parmenter; and he identified the man as Sacco. The only witness at the trial who saw two men fire at Berardelli was Langlois, and he could neither identify the defendants nor give the number of shots. The remaining witnesses saw nothing which would throw any light upon the subject.

It therefore appears that no witness claims that one man shot only one bullet into Berardelli. Nor did any witness see a bandit use two pistols. There is no testimony which accounts for the single bullet from Sacco's Colt, but only testimony which accounts for the bullets from the Savage or Steyr pistols. Moreover, the eyewitnesses contradict the claim of the two Government experts that the five so-called Savage bullets were fired through the same single gun, and support the defendants' expert, Burns, on this point.

There is, of course, no direct testimony that Exhibit 18 was a substitution for the real bullet No. 3. Nevertheless its genuineness appears to depend upon one of the bandits having used two pistols. For this there is also no evidence.

b. Captain Proctor

WILLIAM H. PROCTOR of Swampscott, Massachusetts, had been Captain of the State Police for sixteen years, having been on the force twenty-three years altogether. After the South Braintree shootings he was called to that place and to Brockton and given possession of various bullets and shells. He testified that he had examined different makes of pistols and cartridges and had testified in over one hundred capital cases [886]. He was shown the mortal bullet, Exhibit 18, and asked whether he had any opinion as to its having been fired through Sacco's pistol. He gave his opinion:

"And what is your opinion?—My opinion is that it is consistent with being fired by that pistol.

Is there anything different in the appearance of the other five bullets—
—Yes.

Just a minute, I had not completed. —the other five bullets to which I have just referred, which would indicate to you that they were fired from more than one weapon?—There is not.

Are the appearance of those bullets consistent with being fired with the same weapon?—As far as I can see.

Captain, did you understand my question when I asked you if you had an opinion as to whether the five bullets which you say were fired from an automatic type of pistol were fired from the same gun?—I would not say positively.

Well, have you an opinion?—I have.

Well, that is what I asked you before. I thought possibly you didn't understand. What is your opinion as to the gun from which those four were fired?—My opinion is, all five were fired from the same pistol.

What is the basis of your opinion?—By looking the marks over on the bullets that were caused by the rifling of the gun. It didn't seem to cut a clear groove; they seemed to jump the lands, and seemed to make a different mark than the lands would make." [897]

In this testimony the frequent use of the word "consistent" should be noted, since question arose later as to what meaning had been given to the word by Court and jury.

Proctor was not cross-examined on this subject.

In connection with the fifth supplementary motion there was filed an affidavit by Proctor, sworn to on October 23d, 1923.

"I was associated with the prosecution of the defendants in this case and I had in my custody for a considerable time the Colt automatic pistol taken from the defendant Sacco at the time of his arrest, the cartridges taken from him at the same time, the so-called Fraher shells picked up on the ground at the time of the murder and some other exhibits in the case not material for the purpose which I understand from Mr. Thompson is the subject matter of this statement.

"I also had in my custody and made examination of from time to time, with great care, the bullets said to have been taken from the body of Berardelli, all except one of which were, as I testified at the trial, fired from a pistol which was not a Colt automatic pistol. One of them was, as I then testified and still believe, fired from a Colt automatic pistol of 32 calibre.

"During the preparation for the trial, my attention was repeatedly called by the District Attorney and his assistants to the question: whether I could find any evidence which would justify the opinion that the particular bullet taken from the body of Berardelli, which came from a Colt automatic pistol, came from the particular Colt automatic pistol taken from Sacco. I used every means available to me for forming an opinion on this subject. I conducted, with Captain Van Amberg, certain tests at Lowell, about which I testified, consisting in firing certain cartridges through Sacco's pistol. At no time was I able to find any evidence whatever which tended to convince me that the particular model bullet found in Berardelli's body, which came from a Colt automatic pistol, which I think was numbered 3 and had some other exhibit number, came from Sacco's pistol and I so informed the District Attorney and his assistant before the trial. This bullet was what is commonly called a full metalpatch bullet and although I repeatedly talked over with Captain Van Amberg the scratch or scratches which he claimed

tended to identify this bullet as one that must have gone through Sacco's pistol, his statements concerning the identifying marks seemed to me entirely unconvincing.

"At the trial, the District Attorney did not ask me whether I had found any evidence that the so-called mortal bullet which I have referred to as number 3 passed through Sacco's pistol, nor was I asked that question on cross-examination. The District Attorney desired to ask me that question, but I had repeatedly told him that if he did I should be obliged to answer in the negative; consequently, he put to me this question: 'Q. Have you an opinion as to whether bullet number 3 was fired from the Colt automatic which is in evidence?' To which I answered, 'I have.' He then proceeded. 'Q. And what is your opinion? A. My opinion is that it is consistent with being fired by that pistol.'

"That is still my opinion for the reason that bullet number 3, in my judgment, passed through some Colt automatic pistol, but I do not intend by that answer to imply that I had found any evidence that the so-called mortal bullet had passed through this particular Colt automatic pistol and the District Attorney well knew that I did not so intend and framed his [3642] question accordingly. Had I been asked the direct question: whether I had found any affirmative evidence whatever that this so-called mortal bullet had passed through this particular Sacco's pistol, I should have answered then, as I do now without hesitation, in the negative." [3643]

Mr. Katzmann, replying to this affidavit said:

"I, Frederick G. Katzmann, being first duly sworn, on oath, depose and say, that I have read the affidavit of Capt. William H. Proctor dated October 20, 1923; that the said Captain Proctor examined the four bullets which had been recovered from the body of Berardelli, and the Sacco pistol, in the summer and fall of 1920, and he informed me that three of the said bullets were, in his opinion, fired from a 32 calibre Savage automatic pistol, and that the fourth of said bullets had been fired from a 32 calibre Colt automatic pistol; that later, and prior to his testifying, Captain Proctor told me that he was prepared to testify that the mortal bullet was consistent with having been fired from the Sacco pistol; that I did not repeatedly ask him whether he had found any evidence that the mortal bullet had passed through the Sacco pistol, nor did he repeatedly tell me that if I did ask him that question he would be obliged to reply in the negative." [3681]

Mr. Williams' answer was more explicit:

"I first met Captain William H. Proctor during the trial of these cases at Dedham. I knew that he had made an examination of the bullets taken from the body of Berardelli and asked him what this examination had disclosed. He told me that he had compared these bullets with bullets in his possession which had been pushed by him through various types of pistols, and which had taken the rifling marks of these pistols. He said such comparisons showed that the mortal bullet (later exh. 18) had been fired in a Colt automatic and the other three in a Savage automatic. I asked him if he could tell in what

pistol this so-called mortal bullet was fired and he said that he could not although the marks upon it were consistent with its having been fired in the Sacco pistol. He said that all he could do was to determine the width of the landmarks upon the bullet. His attention was not repeatedly called to the question, whether he could find any evidence which would justify the opinion that this bullet came from the Sacco pistol." [3682]

In March, 1924, before this motion was decided, Proctor died [4132]. Judge Thayer wrote a separate opinion on the Proctor matter. It follows in full:

"The Proctor affidavit, upon which a motion for a new trial is based, is a most unusual one. This is so because the then District Attorney of [3698] Norfolk County is charged with unprofessional conduct, in that he 'framed' certain questions with a view of obtaining testimony from Captain Proctor that he (the District Attorney) knew was not true and which was prejudicial or might be prejudicial to the defendants.

"In his affidavit, he charges the District Attorney (who was then Mr. Katzmann) with 'framing' questions knowing that the answers to which would imply that the mortal bullet (the one that killed Berardelli) was fired through the Sacco pistol. As a matter of fact, Assistant District Attorney Williams conducted the examination of Captain Proctor. Of course, each of said attorneys was entitled to have the specific charges made against him unless there was a conspiracy between the two to 'frame' questions fraudulently for the purpose of obtaining answers from Captain Proctor that were not true.

"Now let us examine the questions and answers carefully, to see if the charges made are consistent with the facts:

"Questions and Answers

"Q. (By Mr. Williams.) Have you an opinion as to whether bullet number 3 was fired from the Colt automatic which is in evidence?

MR. MCANARNEY. Will you please repeat that question?

The question was repeated as follows:

Q. Have you an opinion as to whether bullet number 2 [sic] was fired from the Colt automatic which is in evidence? A. I have.

Q. What is your opinion? A. My opinion is that it is consistent with being fired from that pistol.

"In my judgment, the questions propounded by Mr. Williams were clearly put, fairly expressed, and easily understood; they have been so commonly used by experienced trial lawyers throughout the Commonwealth for so many years that they have become almost stereotyped questions. It cannot be said that Captain Proctor did not have time to fully understand and appreciate the full meaning of the questions propounded to him, because the first one was put twice to him before he answered.

"Let us now carefully consider the questions and answers by applying to

them the usual tests of ascertaining facts. Were any of these questions 'framed' by Mr. Williams on account of any unworthy or improper motive? Study the fairness of the questions propounded by Mr. Williams, with the view of determining whether or not Captain Proctor did not have the fullest opportunity to express his honest opinion. Is there any hidden mystery or unworthy concealed motive in the first question, which is as follows: 'Have you an opinion as to whether bullet number 3 was fired from the Colt automatic which is in evidence?' Bullet No. 3 was the mortal bullet, and the only Colt automatic which was in evidence was the Sacco pistol.

"Is there anything about that question that any man who has been a member of the State Police for over thirty years could not easily and [3699] readily understand, if he was then in full possession of his mental faculties and was desirous of expressing his true opinion? Was there any power under the sun that could have prevented him from expressing his honest conviction at that time?

"Now, what was his answer to the question which was as follows: 'Have you an opinion as to whether bullet number 3 was fired from the Colt automatic which is in evidence?' His answer was: 'I have.' So now it is absolutely certain that Captain Proctor had then formed an opinion on that question.

"Now, let us consider the next question, which was as follows: 'And what is your opinion?' Is there anything unfair or improper in that question? By that question, did not Mr. Williams invite Captain Proctor to state his true opinion at that time?

"In the first place, let us inquire what was Captain Proctor's answer to that question. It was as follows: 'My opinion is that it is consistent with being fired through *that pistol*. Certainly there is no ambiguity, doubt or uncertainty in that answer.

"Captain Proctor now says that had he been asked if he found any affirmative evidence that the mortal bullet passed through the Sacco pistol, he would have answered then 'as I do now, without hesitation, in the negative.' As I said before, it is not a question of how he would answer at the time he signed the affidavit, but what did he in fact and truth answer at the trial, and what did he then mean.

"My next inquiry is this: To test the accuracy of the statement of Captain Proctor, let me make the inquiry: When Mr. Williams asked him for his opinion, in reply to the question whether the bullet number 3 (the mortal bullet) was fired from the Colt automatic in evidence, why did he not then answer, *without hesitation and in the negative*? In other words, why did he not answer that it was his opinion that the mortal bullet did not pass through the Sacco pistol? For no witness who ever went upon the witness stand had a better opportunity to express his true opinion than did Captain Proctor at that time.

"Again, if Captain Proctor found no facts in his examination that would warrant the opinion that the mortal bullet did pass through the Sacco pistol, if he was then desirous of expressing his true opinion, why did he then use

the expression that it was 'consistent with it.' The word 'consistent' was selected by Captain Proctor and not by Mr. Williams.

"Again, I ask, if Captain Proctor found no facts that caused him to believe that the mortal bullet passed through the Sacco pistol, why, when he had a perfect opportunity so to do, did he not say that his opinion was then, as it is now, that it was not *consistent* with it? Can it be possible that Captain Proctor's mental condition was in such a state at the time of trial that the words 'consistent with' and 'inconsistent with' had the same meaning to him?

"In other words, it must be too plain for discussion that one cannot very well have an opinion that it was consistent with the mortal bullet having passed through the Sacco pistol and at the same time be inconsistent. [3700]

"Again, I am asked to believe that when Captain Proctor testified in court to the effect that when he said it was consistent with being fired through the Sacco pistol, he intended to mean that it might have been fired through any 32 calibre Colt automatic, and that was all.

"Now, let us throw the searchlight of careful investigation on that statement. If it is true, why after searching through his vocabulary of expressions did he select, of his own volition, the words 'that pistol'? For, it must be remembered that the only pistol at that time that he had been offered in evidence was the Sacco pistol; therefore, I must find that the use of those words 'that pistol' can apply to only *one pistol*, and *that pistol* was Sacco's pistol.

"Now, let us proceed further with this inquiry, with the further object of ascertaining what was then the real situation. Counsel for the motion, with great earnestness and force, argued that the true interpretation of this affidavit is as follows: that the District Attorney, knowing that Captain Proctor honestly believed that the mortal bullet was not fired through the Sacco pistol, by prearrangement with Captain Proctor prevailed on him to compromise the truth, in that Captain Proctor should testify that it was his opinion that it was consistent with its having been fired through the Sacco pistol. In other words, that Captain Proctor, by prearrangement (which means intentional) compromised the truth with the District Attorney by his (Captain Proctor's) testifying knowingly to something that was false.

"I do not believe that the interpretation of counsel for the motion is the true one. Neither do I believe that Captain Proctor would like this interpretation, for if it is true it places him in the very unfortunate position of testifying intentionally to something that was false. Knowing Captain Proctor as I do, I do not take any stock whatsoever in this interpretation; neither do I think that Captain Proctor would like to either. If I did, I feel that I would be doing a tremendous injustice to him and this, under no circumstances, will I do. I have referred to this matter for the purpose of showing its absurdity and the length to which counsel, in their over-enthusiasm during heated discussion, will sometimes go; for this conclusion, like all other conclusions, becomes illogical, unreasonable and unsound when not constructed on the solid foundation of established facts and truth.

"Now, let us see what Captain Proctor did intend to say when he testified,

and what was the probative effect of his testimony. Captain Proctor was not at the time of trial a most impressive witness. Counsel for the defendants had considerable difficulty in holding him to the questions put. He testified, among other things, that he knew little, if anything, about pistols or ammunition or even the purpose of the breech blocks of pistols, which in many cases play a very important part in identifying the pistol through which a certain bullet was fired; he also admitted his knowledge on this question was limited to the measurements of lands in the barrel of pistols and the land cuts on mortal bullets. This is only one step toward identification, but many other things are necessary to a reasonably [3701] certain identification. Some of these other things Captain Van Amburgh found and testified to. With his limited knowledge, Captain Proctor did not testify that the mortal bullet did pass through Sacco's pistol, but that from his examination of the facts it was simply consistent with it.

"Now, what did *his* examination reveal? He satisfied himself from his investigation so that he testified positively that the mortal bullet passed through a .32 calibre Colt automatic pistol. This was one step toward establishing the identity of the bullet that passed through the Sacco pistol, and it was a very important one. He also made measurements of the width of the lands in the barrel of the pistol and he gave the width of the land cuts or grooves on the fatal bullet as .060, the latter measurement being exactly the same as was that of Captain Van Amburgh, and, from such examination, his opinion was that it was 'consistent with its being fired' through Sacco's pistol. This is a long way from saying that it was his opinion that in fact it did pass through the Sacco pistol.

"Now, let us ascertain how counsel on both sides interpreted this opinion of Captain Proctor now under consideration. I have taken the pains to examine the record. I found that counsel for defendants, in cross-examination of Captain Proctor, were so well satisfied with its lack of probative weight, that he was not asked a single question as to the passing of the mortal bullet through the Sacco pistol. But, when we examine the record with reference to the cross-examination of Captain Van Amburgh, who did so testify, hours were consumed on him with inquiries that referred exclusively to this particular subject. The testimony of Captain Proctor, on the other hand, was evidently so satisfactory in its probative effect that able counsel did not think it worthy of one single question in cross-examination. Here speak volumes.

"Again, although it was claimed in argument by counsel for the defendants that the District Attorney fraudulently 'framed' a question to Captain Proctor because of his standing at the head of the State Police, yet the record shows a clear refutation of the imputation because it shows that the District Attorney himself, regarding Captain Proctor's testimony as of little weight, did not, in his final argument which consumed nearly four hours, once call Captain Proctor by name.

"Again, it was argued that the court understood that Captain Proctor testified to the effect that the mortal bullet was fired through the Sacco pistol. This is another interpretation of counsel that I do not agree with. Of course,

the Court referred to this matter in the following language: 'to this effect, the Commonwealth introduced the testimony of two experts, Messrs. Proctor and Van Amburgh; on the other hand, the defendants offered the testimony of two experts, Messrs. Burns and Fitzgerald; to the effect that the Sacco pistol did not fire the bullet that caused the death of Berardelli.'

"It is not the duty of the Court, in charging a jury, to deal with the weight and probative effect of testimony of witnesses. The statute expressly forbids the Court so to do. And, furthermore, it was clearly the duty of the Court to say, referring to the testimony of Captain Proctor, that [3702] there was some testimony notwithstanding its frailty that tended to prove this fact in question, for Captain Proctor did testify that some Colt .32 calibre automatic fired the fatal bullet. Again, he testified at least to one measurement that corroborated the testimony of Captain Van Amburgh, who testified that he was of the opinion the fatal bullet was fired through the Sacco pistol. From these facts Captain Proctor testified that it was his opinion that it was consistent with it. Therefore, it was a mere statement to the jury of the testimony of Captain Proctor that tended to prove a certain proposition; but, so far as proving it is concerned, that was clearly within the province of the jury.

"FINDING OF FACTS

"I sincerely hope that I have not dealt unkindly or unfairly in what I have said concerning this affidavit. I fully appreciate the fact that age had left its heavy burden upon this man's shoulders, after a great many years of honorable service to the Commonwealth. But it must be remembered that it was his affidavit that has made it very distasteful and unpleasant to me in determining the merits of this motion. For it must also be remembered that it was he who charged the District Attorney, Mr. Katzmann, and his then assistant, Mr. Harold P. Williams, with misconduct in their respective offices, which misconduct assailed their honor, their integrity, and their solemn obligation that they were then under to the Commonwealth, to the defendants and to the Court; for it must ever be borne in mind that their honor, reputation and high standing at the bar were dear and precious to them; and, before these excellent human traits, which are so essential and important to every honorable lawyer throughout the Commonwealth, are taken away (traits of character which, if taken away, can never be restored), they have a perfect right to ask that their accuser shall furnish evidence against them that is clear, satisfactory and convincing. Metaphysical argument and illogical conclusions based thereon by skilful counsel should never prevail against pure logic that is based upon established facts.

"Therefore, in determining the merits of this motion, I have endeavored, to the best of my ability, to ascertain what are the facts, because such ascertainment is the only guiding star to truth; for the ascertainment of truth in all controverted questions of fact is and always has been the supreme command of the law, and as long as we obey it, the safety and protection of the people of the Commonwealth will rest secure.

"COUNTER-AFFIDAVITS

"With my findings of facts, it is unnecessary for me to state at length and in detail the contents of the counter-affidavits of Messrs. Katzmann and Williams.—they are clear and convincing. I cannot, however, close this phase of the matter without saying that I carefully watched the conduct of both Messrs. Katzmann and Williams in the trial of these cases [3703] for nearly seven weeks, and I never observed anything on their part but what was consistent with the highest standard of professional conduct.

"DECISION

"For the reasons hereinbefore given and others not herein specifically mentioned, I find that the defendants have not established, by a fair preponderance of the evidence, any of the material allegations in the so-called Proctor affidavits which would warrant me in granting a new trial. Therefore, exercising every authority vested in me by law that relates to the granting of motions for new trials, I decline to grant this motion for a new trial on the Proctor affidavit, and the same is herein and hereby denied." [3704]

In this decision Judge Thayer is unable to suggest anything which Proctor might have meant more than that the bullet might have been fired through any Colt. This meaning, however, the judge disavows.

On appeal the Supreme Judicial Court called the question one of fact for the Judge, and said that his conclusion that no misconduct by the District Attorney had been established could not be reviewed:

"The defendants do not controvert the unbroken practice, both under the statute and at common law respecting motions for new trials, not to examine the original trial for the detection of errors which might have been raised by exceptions taken at the trial; or that the judge when instructing the jury may state his recollection of evidence. *Commonwealth v. Dascalakis*, 246 Mass. 12, 24. *Commonwealth v. Walsh*, 196 Mass. 369, 370. They charge that a successful attempt was made to mislead the court, the jury, and the defendants' counsel by the deliberate suppression of material evidence which, if introduced, would have been favorable to them. It was the duty of the district attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendants, *Attorney General, petitioner*, 104 Mass. 537, 544. And if through the purposed conduct of the representatives of the Commonwealth prejudice was deliberately created, the question would be presented, whether justice had been done and if not done whether a new trial, at least as to the defendant Sacco, should be ordered. The question, therefore, before the judge on all the affidavits was one of fact. As we have said: he presided at the trial, instructed the jury and had the affidavits before him. It would have been sufficient if, having so determined, he denied the motion and nothing more. But instead he deemed it his duty to file a decision which is made by the appendix to

the bill a part of it. This mode of procedure however, did not change the rule that the question of granting a new trial even in a capital case, or [4356] ordinarily rests on the sound discretion of the court. The credibility of the affiant Proctor, even if his affidavit is read in connection with the affidavits of Hamilton and Gill filed by the defendants, was for the judge, who, among other things, expressly found that neither the district attorney nor his assistant intentionally solicited an ambiguous answer to the questions under consideration for the purpose of obtaining a conviction. The burden was on the defendants to establish wilful misconduct of the prosecuting officers by a fair preponderance of the evidence and the conclusion of the judge that this burden had not been sustained cannot as matter of law be set aside by us. The defendants' exceptions to the refusal to give requests numbered 19 to 23 inclusive are not well taken. Their exceptions to the overruling of the motion are untenable. The judge's analysis of the evidence and his comments thereon, contained no positive rulings of law, and the following conclusion: 'Therefore, exercising every authority vested in me by law that relates to the granting of motions for new trials, I decline to grant this motion for a new trial on the Proctor affidavit, and the same is herein and hereby denied,' cannot be successfully challenged. *Commonwealth v. Russ*, 232 Mass. 58, 83." [4357]

Before the Lowell Committee, ELIAS FIELD, a respected lawyer of Boston, testified that on August 7th, 1923, in connection with a case of his own he took Hamilton and Proctor in his automobile to examine some exhibits and that on the trip he heard Proctor tell Hamilton he did not believe the bullet had gone through Sacco's gun:

"And Capt. Proctor said in substance, 'I don't care. I have been too old in the game, I have been too long in the game, and I'm getting to be too old to want to see a couple of fellows go to the chair for something I don't think they did.' Hamilton said in substance: 'I have read over your testimony Capt. Proctor and I wondered why you didn't go any farther with your examination with respect to the way the death bullet went through that particular gun. I noticed that as far as you went was consistent or it was consistent.'

(By Judge Grant) Consistent?—Proctor said 'If they had asked me any more particularly than that I should have told them I didn't think it went through that gun and I did tell the District Attorney before the trial I thought it was consistent with going through that kind of a gun, but I don't think it went through that gun.' Hamilton said 'I wonder why the defense didn't take it up.' Proctor said in substance, 'I wondered too, but I suppose they were afraid to. Among the other things that Capt. Proctor said was that Katzmann and Williams had been at him for a long time to get him to express an opinion that the bullet went through that particular gun, and that he had told him after his experience or examination that he didn't think it did and that thereupon they got this man, Van Amburgh.'" [4975]

Field's impression was that Proctor had meant merely that it was through some Colt that bullet No. 3 had gone:

"(By Judge Grant) What do you think Procter really had in his mind?—(By Mr. Field) Judge, I got the impression that he had been of one mind, that he was afraid, and so had told the District Attorney of his opinion that he wouldn't go far enough in his opinion to help the prosecution as much as they needed to be helped. I did not get the impression that he changed his testimony. Now that this record is read, as a matter of fact, I have seen his testimony more recently than that. My impression is that he said it was consistent with going through that gun, that was as far as he was going, and to so answer, meaning that it was consistent with going through that kind of a gun. [4979]

(By Judge Grant) He gave the impression that this mortal bullet had passed through the gun.—In his testimony at the trial that was the impression.

Yes, I know. Did he say anything about testimony about Williams or Mr. Katzmann at the time he talked to Hamilton?—I don't remember that he did." [4980]

HAMILTON, before the Lowell Committee, testified as to his conversation with Proctor:

"In other words he told the district attorney, he told me that several weeks before the actual trial he had told the district attorney that he had made several examinations and comparisons of the mortal bullet with the Sacco pistol and with the test bullets and it was his opinion that the mortal bullet was not fired through the Sacco pistol and so informed the district attorney and warned him that, if he were put on the stand and asked a specific question, he would admit it was his opinion that the mortal bullet was not fired through the Sacco pistol. I am giving the gist of his conversation with me coming down from his home. That the pressure by talk was brought to bear upon him by the district attorney, calling his attention to what it might mean to his official position, if he should stand out in this important case in view of the radicalism of it, because of the defendants, and refuse to go on the stand and it became known his opinion was in favor of the defense. He said he understood from the district attorney it might mean the loss of his state job and he entered into this arrangement and gave the answer to the question that is on your record. After he had practically confessed this to me, stated it to me on the back seat, some of which Mr. Field heard and some I doubt he did hear, we were all still quite a while, a number of miles. I was thinking what my attitude should be.

(By Pres. Lowell) I understand that he told you that he had formed the opinion which he constantly retained that this bullet was not fired through the Sacco pistol?—Weeks before the trial and so informed the district attorney.

And then testified at the trial that his opinion was it was consistent with being fired through the Sacco pistol, when his opinion was that it was in-

consistent?—His opinion was not only that it was inconsistent but it was not fired through the Sacco pistol. He admitted to me so that I understood him to impart to me that he knowingly testified what was not so and was misleading to court." [5007]

Questioned by Mr. Lowell, Hamilton said:

"I want to ask you whether you are perfectly sure that what Captain Proctor told you wasn't the same thing that he said in his affidavit? In his affidavit he says practically just as he said at the trial that he had no opinion whether this was fired through the Sacco pistol or not but it was consistent, but he told you he had an opinion and that was that it was not fired through the Sacco pistol.—Weeks before.

I want to know if you are sure?—I am positive that he told me what I have already told you here. Especially I remember distinctly his stating that weeks before he had told the district attorney, mentioned his name, Katzmann, that it was his opinion that the mortal bullet did not go through Sacco's pistol. I am most positive that he said that.

I want to get your impression. Your impression is that he stated a certain thing at the trial, told you that was perjury, that—— —He didn't use the word perjury.

He told you it was not true and then signed an affidavit saying it was true.

(By Judge Grant) In other words he accused the district attorney of fraud and himself of perjury and then afterwards signs an affidavit which is different from what he told you.

(By Pres. Lowell) I want to get what your recollection is, that is, your definite recollection.—I have a definite recollection. When he wrote his affidavit for the first time, I saw at once it did not cover all he told me.

Not that it did not cover all, but it was contradictory to all he told you.—It was in a way and I thought it was a way of letting himself down." [5014]

THOMAS MCANARNEY, one of Vanzetti's lawyers at the trial testified he had thought that Proctor intended expressing a positive opinion, and said he had been afraid to cross-examine lest the matter be clinched:

"What did you understand him to mean when he said it was his opinion that it was consistent that the mortal bullet was fired from Sacco's pistol?—I understood that he thought that bullet came from Sacco's pistol.

So that was the reason you didn't question him further?—I thought that was a good reason for leaving him alone. [5054]

Do you recall the charge of Judge Thayer?

(By President Lowell) By that it was consistent that in his opinion it was fired from that pistol, what did he mean?—That was in Captain Proctor's testimony. I knew Captain Proctor to be an expert on such things and knew he was about courts a lot, and I have seen such questions many times before, and when a man says such a thing is consistent I thought that he would follow it up, that he would give reasons, explaining exactly that it was the bullet.

(By President Lowell) Then it was a hoax?—Yes, in other words it was simply a catch. Some cross-examiners might stumble into it.

You felt sure that was done to get you to cross-examine in order that it might be clinched on the other side, and so you simply avoided it in your cross-examination?—Yes." [5055]

At a later session, Mr. McAnarney was asked by President Lowell what he had understood by Proctor's use of the word "consistent," and why he had not cross-examined Proctor on the subject:

"—I had never met the Captain before but I had heard that he had testified in a great many cases and that he was the leading expert for the Commonwealth at that time. When he made that statement I understood that he meant that bullet did come from or through Sacco's automatic. That was what I gathered from what he said, having in mind his old experience,—and I don't know how old he was,—but experienced in the ways of the court and experienced in testifying, and when he said, 'Consistent,' I assumed that he meant it did go through. [5188] . . .

—Assuming that you were defending somebody, you were the defendant's counsel, and against you was an old experienced policeman who testified that certain things were consistent with something, and you have had a great many years' experience examining police cases and often times have been tumbled into traps which were laid for you,—and perhaps traps is not the word to use,—but tumbled into situations, that I felt it was the wiser course, not knowing what reply I would get, not to ask anything. In fact, I think the least said on cross-examination, unless I have a pretty strong notion of what is coming, is the best.

I only wanted to get an impression in my own mind as to what that did convey to you.—There he was a great big powerful man with that gun and pistol before him and he said, 'That is consistent.'

It was a curious expression to use. If he meant, 'That is my opinion,' that it did go through the gun, it was a peculiar expression, if he meant to say so.—What a boomerang it would have been if I had pressed him and he had picked up the bullet and said, 'Come here. What I mean by "consistent" is that it did come through, and I can show it to you,' would that hardly have been wise, not knowing what he was going to say?

I am not trying this case, unfortunately, but I wanted merely to know what impression it had on your mind.—That was my impression clearly and unmistakably. In fact it was more than my impression, it was my belief that that was what he meant.

PRESIDENT LOWELL. Thank you. That is what I wanted to know." [5189]

MR. KATZMANN the District Attorney, was asked by Mr. Thompson whether Proctor had ever told him he had the wrong men and said that he did not remember:

"Your answer would be that Captain Proctor never said to you, did not express to you the opinion that these were not the men who committed

that crime? Will you give me your answer on that on your honor.—My answer is that I have no recollection of him saying that.

You will not go so far as to positively deny that he said that?

No, I cannot do that." [5084]

Katzmann's only other comment on the Proctor incident was to mention that there had been a disagreement with Proctor about a bill for \$500. [5085]

The Lowell Committee in its report said:

"Counsel for the defendants claim that the form of the question and answer was devised to mislead the jury; but it must be assumed that the jury understood the meaning of plain English words, that if Captain Proctor was of opinion that the bullet had been fired through Sacco's pistol he would have said so, instead of using language which meant that it might have been fired through that pistol. In his charge the Judge referred to the expert evidence on the question whether the bullet had been fired from Sacco's [5378q] pistol, saying 'To this effect the Commonwealth introduced the testimony of two experts, Messrs. Proctor and Van Amburgh.' These two men did testify on the subject, the first saying that it might have gone through Sacco's pistol, the second that it did so; the experts for the defendants giving their opinion that it could not have gone through Sacco's pistol. It may be observed that the prosecuting attorney did not put the words into Captain Proctor's mouth, but asked him simply what his opinion was, and that Captain Proctor in answer used words that seem not unadapted to express his meaning. It does not seem to us that there is good ground to suppose that his answer was designed to mislead the jury. We shall return to this subject in connection with new evidence brought to the Committee. [5378r] . . .

"It seems to us improbable that Captain Proctor, who has since died, should have stated both at the trial and in his affidavit that his opinion was consistent with the firing of the bullet from Sacco's pistol, and in the meanwhile should have said in conversation that his opinion was exactly the opposite. One of the witnesses, Field, merely overheard Proctor's conversation with Hamilton about a subject with which he was not familiar; and the latter stated also to the Committee that Proctor told him that he believed before the trial the bullet was not fired through the Sacco pistol, which would be an admission not of a misleading statement but of deliberate perjury. This charge is inconsistent with Proctor's later affidavit, and we do not believe Hamilton's testimony on this point." [5378u]

The Committee was, of course, at liberty not to believe Hamilton. No one questioned Field's integrity or ability, however, nor was his testimony as meagre as the report indicates. The rejection of Hamilton's testimony as inconsistent with the affidavit which Proctor gave on the motion rests on doubtful logic. It is true that Proctor reaffirmed his belief as expressed at the trial, but he also stated its real meaning. This part of his statement

was ignored by the Committee, which quoted a portion of his affidavit but omitted the reason he gave for his belief. The affidavit was quoted as stating "that is still my opinion," whereas the actual text was: "that is still my opinion for the reason that bullet No. 3, in my judgment, passed through some Colt automatic pistol." [3642]

In other words, in that affidavit Proctor says substantially what Hamilton testified to later. It is true that in the affidavit there is only the negative statement that he found no evidence that the bullet had passed through the pistol, whereas Hamilton stated Proctor expressed the belief that the bullet had not passed through the pistol. Hamilton, however, did not say Proctor claimed to have found positive evidence that the bullet had not gone through the pistol. Such testimony would have been inconsistent with the affidavit. The actual testimony was not inconsistent. An expert who can find no evidence of the truth of a proposition in a case where evidence would exist were the proposition in fact true, must necessarily be of the opinion that the proposition is false. The exact intention of his answer is set forth by Proctor in his affidavit as directly as was compatible with his own safety. It is not surprising that orally he should have expressed himself somewhat more freely.

That the answer at the trial must in fact have been misleading is apparent from some of the contemporaneous press reports. Even Judge Thayer seems to have had the same impression. His charge (quoted at page 366) makes no difference between Proctor and the other prosecution expert. After stating the claim of the prosecution that it was Sacco's pistol which had fired the mortal bullet, he says that the testimony of two witnesses was introduced "to this effect." He later argued that, as he had no right to comment on the weight of testimony, and as Proctor had given some testimony tending to prove the fact, his statement to the jury was nothing more than the record justified. In other words, Judge Thayer would have "to this effect" mean "on this subject." It would seem, however, that any jury would be warranted in supposing that the Court thought and had charged that both experts had testified in accordance with the claim of the prosecution. The Lowell report omits the important portion of the charge to which "to this effect" relates, namely, the portion which deals with the claim of the Commonwealth that bullet 3 was fired through the barrel of Sacco's Colt.

c. Did the fatal bullet and the Fraher shell go through Sacco's gun?

JAMES F. BOSTOCK, one of the eyewitnesses of the shooting, picked up three or four empty shells a few feet from the spot and left them in a desk in the office of Slater & Morrill. He saw some shells besides these being picked up by other people [195]. He was asked nothing about the shells on cross-examination.

THOMAS F. FRAHER, the superintendent at Slater & Morrill's, testified that Bostock delivered to him four empty shells of 32 calibre and that he turned

them over to Captain Proctor [882]. On cross-examination he said that no identifying marks had been put on those shells by him. [883]

The shells were shown at the trial to CAPTAIN PROCTOR of the State Police and were then marked Exhibit 30. Proctor testified they had been in his possession from the day of the crime until turned over to the sheriff in court [885]. One of them was a Winchester and all were of 32 calibre [886]. He thought the Winchester had been fired out of a different pistol from the one out of which the other three came:

"And on what do you base your opinion?—Well, the looks of the hole in the primer that the firing pin struck that exploded the cartridge.

(Mr. Williams shows the shells to the jury.)

MR. WILLIAMS. Gentlemen, the one in my right hand is the one that he says, in his opinion, was fired from one, and the other three in my left fired from the other.

Now, will you examine that W. R. A. [Winchester] that we will call for the minute the Fraher shell, and compare it with the six shells fired by you and Captain van Amberg, of which, I understand, three are W. R. A. and three are Peters, and ask you if, in your opinion, the marks on those seven shells are consistent with being fired from the same weapon?—I think so, the same make of weapon.

And on what do you base that opinion?—Well, there is a similarity between the W. R. A. and the other cartridges that were fired." [895]

He was then asked if he had an opinion on whether bullet 3 was or was not fired from Sacco's Colt, and he answered, as already quoted,¹ that in his opinion it was "consistent with being fired through that pistol." [896]

It will be observed that Proctor did not state definitely that the Winchester shell had been fired by Sacco's pistol. He said it had been fired by the same make of pistol, giving, as his sole reason for the statement, a similarity in the firing-pin hole or indentation, which similarity he did not find on the other Fraher shells. He gave no reason for his opinion as to the bullet itself and was not asked to state the measurements of any of the markings on either the bullets or on Sacco's pistol with this exception, that he gave the grooves of bullet No. 3 as being .060 inch. This, he said, was characteristic of a 32 Colt. [893]

On cross-examination no questions were asked as to this witness' intention in using the word "consistent." Before the Lowell Committee Mr. Thomas McAnarney said he had thought at the trial that Proctor was of the opinion that the bullet had come from Sacco's pistol; and that he had therefore concluded it was desirable to leave him alone [5054], since, had he not done so, Proctor would have been in a position to give his reasons. He had believed Proctor's testimony was a catch into which some cross-examiner was to have stumbled. [5055]

The cross-examination of Proctor dealt briefly with his knowledge of other left-twist pistols [898-899] and included an unsuccessful attempt to

¹ See pp. 342, 343.

get him to say from what pistol various bullets shown him had been fired. [902-909]

CHARLES VAN AMBURGH, of the Remington Arms Company, testified about his experience:

"I have been calling you Captain, and ask you now if you have that title so that I may not miscall you on the stand?—I might explain I held that rank during the war for one and one half years during the war, and now in the Reserve Corps.

What is your occupation or profession, Captain?—At present, I am an assistant in the ballistic department, Remington U. M. C. Company.

And where are you located?—In Bridgeport, Connecticut.

Captain, would you give us briefly your experience in reference to firearms and ammunition for firearms, dealing with them, measuring them, and so forth?—For nine years I was connected with the Springfield Armory, —that is, eight years of it at Springfield Armory, the manufacture of the United States rifle, or, at least, where the rifle is manufactured; one year at Frankford Arsenal, Philadelphia, where our United States and our government ammunition——

Will you indicate as you enumerate the various places where you have been employed the nature of the work which you there did, beginning with Springfield?—The Springfield Armory, experimental work. That is, the experimental department, experimental firing with rifles, mainly military rifles and automatic pistols, machine guns. Also inspected ammunition. I might explain that particular point as it is an arms factory. That is, headquarters for inspection and for armament or ordnance district, and inspectors were frequently detailed from there to visit ammunition factories who were under contract for ammunition for the United States Government, and I at one time was detailed on such an errand. [911]

One year at Frankford Arsenal, entirely in the testing of ammunition. Leaving there, I was with the New England Westinghouse Company for about two years, in the manufacture of the Russian rifle, in the test department, by the way. I was assistant proof master. Leaving there during the war, I was about one year in the employ of the Colt Patent Firearms Company in one of their branch plants,—Meriden, Connecticut, to be specific. Then I went,—accepted a commission in the Army. Coming out of the Army——

How long were you in the Army?—One and one half years. I was instructor in small arms firing or marksmanship with rifle and pistol. Upon discharge, I went with the Remington U. M. C. Company in ballistic work, which I might explain pertains to tests of arms and ammunition, ballistic." [912]

He said bullet No. 3 measured across the lands between .107 and .108 and across the grooves about .060 of an inch [915]. It was his opinion it had been fired from a Colt. [916]

Asked about the shells, this witness said there was a "very strong sim-

ilarity" between the Fraher Winchester and the three Lowell Winchesters; namely, that the "indentation is off center slightly in all four"—"about the same diameter and depth . . . a set-back . . . a slowing back of the metal around the point or end of the firing pin" [919]. This set-back was due, he said, to an opening in the mouth of the firing-pin hole, was "not unusual," but did not happen in all guns; it evidenced itself by a little ridge of metal around the hole. Mr. Williams requested the jurors to examine the ridges on the shells. [920]

Van Amburgh was asked his opinion about the mortal bullet and testified as follows:

"Now, Captain, having in mind the similarities of the shells of those cartridges, having in mind your examination of No. 3, your examination of the six bullets fired by you and Captain Proctor at Lowell, have you formed an opinion as to whether or not the No. 3 bullet was fired from the Colt automatic gun which you specifically have in front of you?—Will you just state that question again, please? I don't quite get it all.

You may strike that out, please. Have you formed an opinion, Captain, as to whether or not No. 3 bullet was fired from that particular Colt automatic?—I have an opinion.

And what is your opinion?—I am inclined to believe that it was fired, No. 3 bullet was fired, from this Colt automatic pistol. [920]

And when you say 'this,' you mean the one that you have before you?—The one I have before me.

Now, what is the basis for your opinion, Captain, or bases?—My measurements of rifling marks on No. 3 bullet as compared with the width of the impressions which I have taken of No. 3 or of this particular barrel, together with the measurements of the width or dimension of rifling marks in bullets recovered from oiled sawdust in Lowell, inclines me to the belief

Now, what marks have you observed which occasioned you to have that belief?—You mean, in addition to the dimensions of rifling marks?

Yes. I mean, are there any peculiarities or irregularities of those bullets which you have observed which assist you to form an opinion?—There are.

And will you describe them to the jury?—There are irregularities evidently caused by similar scoring or irregular marks in rifling which appear on all bullets which I have examined that I know have been fired from this one automatic pistol which is before me.

Yes. And what about No. 3?—No. 3 bullets, I find on No. 3 bullets such evidence of scoring in the barrel. It takes on the bullets the form of a, well, a long streak bordering close on the narrow cut, the land cut, on the bullet. [921] . . .

Are there any marks upon the bullets consistent with the tracks which you have seen in the barrel?—I know of no others, I can think of no others, that I have noticed, for the moment, other than those caused by those rough tracks in the barrel.

And how many of those are there on the bullets?—There seems to be one

which has impressed me very much, one streak along each bullet fired through this exhibit gun—very pronounced. Others are not quite so prominent." [922]

This track in the barrel was shown the jury at the window of the court room. Van Amburgh said the track or pit was due to rust which had been allowed to eat its way in.

On cross-examination he stated pitting was generally due to rust [923]. "It is quite common." He found it most noticeable in Sacco's gun in the groove, [924], at the junction of the groove and the land, the point at which such pitting would ordinarily occur [925]. He said three of the Fraher shells were all similar as to indentation from the firing-pin:

"—The difference in shells which I must have had in mind—I have not got the entire answer, but the only difference I have noted in shells is a difference in the size of the firing pin indentation.

So that you do notice the difference in the pin indentation in the Fraher shells and the—— —Pardon me. What is the name of those exhibit shells?

Fraher, F-r-a-h-e-r, I think, or 'a-i-r.'—Fraher. Well, among the Fraher shells—— May I explain it?

Yes, please.—There were four all told. Three of them are similar in point of indentation in primer, and one is alone of its kind. Of those fired in Lowell, they agree very closely with that one." [926]

The witness produced one of the shells fired at Lowell [928] and said it was "clean" and that the lands and grooves showed very well. [929].

The lands on Sacco's pistol, he said, measured .060, the grooves .107 [932].

It will be noted that Van Amburgh did not give it as his opinion that the Fraher shell was fired by Sacco's pistol; also, that his opinion about the bullet was preceded by "I am inclined to believe."

Both experts for the prosecution, therefore, limited themselves to pointing out similarities between the Fraher shell and the Winchester shells fired at Lowell, and expressed no belief that the former had been fired by the same pistol as the latter. Nor did either expert make a clear, unqualified assertion that bullet No. 3 had been fired through Sacco's pistol.

Defendants' expert, JAMES E. BURNS, had for thirty years been employed by the United States Cartridge Company. Asked about his qualifications, he said:

"So that for thirty years you have been with this same company?—Yes.

Now, have you had outside experience other than working for the Company?—Why, naturally I am, I like shooting and I have followed the rifle game in the militia. I have been in the militia eighteen years, followed the rifle game, shot on the Massachusetts team and won distinguished marksmanship in the United States with the rifle; with the shotgun, an expert, and

shot on the Eastern team against the West in 1893 and beat them. Pistol,—I won the championship of Massachusetts. [1405]

Well, I realize you are talking about yourself, but we want your experience.—I do this and go into this so I can feel the pulse of the shooter and, you know what he wants. A man advertising ammunition has got to know what the shooter wants in order to develop the goods to be satisfactory. That is the idea of going into the shooting game.

So that during your experience during these thirty years in the factory you have kept in touch with the actual use of the various weapons?—I have.

In competition? —I have. Because that is the only way to know. You can make ammunition to suit yourself, but the other thing is to make it suit the other fellow, the fellow who is going to buy it, and the only way you can do that is to feel his pulse, get out and shoot with them." [1406]

Burns measured the lands of bullet No. 3 as from .050 to .060 and the grooves .105. He thought it had been fired through a Colt or a Bayard [1408, 1409]. The groove was wider at the top than at the bottom on account of corrosion in the barrel, an irregularity not found in the bullets fired at Lowell. [1411, 1412]

Burns said that bullet No. 3 had not been fired from the Sacco gun:

"Well, having in mind the appearance of No. III on the photograph there, bullet No. III, and having in mind the grooves made on the [1413] bullets fired from the Colt automatic and designated as the Sacco gun, have you an opinion as to whether the so-called fatal bullet No. III was fired from the Sacco gun?—I have.

Was it fired from the Sacco gun?—Not in my opinion, no.

What is the ground and base of your opinion, and on what do you base that opinion?—On the 11 bullets that I examined that were fired from the Sacco gun. It doesn't compare with it at all.

In what way does it not compare with it?—It shows a clean-cut lead all the way through, the same diameter, the same width at the top as it does at the bottom, practically no difference.

What does the fact that the groove is clean-cut all the way through coming from the Sacco gun indicate with reference to the rifling of that gun, the condition of the rifling?—Clean lead.

That it has a clean lead?—Yes.

In your opinion was bullet No. III fired from a gun that had a clean lead?—You mean this gun?

That [indicating] is the Bayard. The other.—Oh, the other?

I am speaking of No. III; was that fired from a gun that had a clean lead?—It was not.

Is there any doubt about that?—No doubt in my mind, no, sir.

Any other reason that you have from the appearance of the bullet that would indicate that it was not fired from the Sacco gun?—That is all. The main point. The bullet is deformed so you could not get any connecting links as to diameter. Those were wiped out." [1414]

There was not enough pitting in the pistol, he said, to identify bullets fired through it [1423]. He had fired about one hundred bullets through various scored barrels and was unable to identify which were which:

"Now, you made your experiments, and after firing those guns what do you say with reference to whether any man can determine a bullet came from the Sacco gun by reason of any alleged scoring on that gun?—No, sir.

Why not, if you please?—Because you can't get a bullet through a gun,—a bullet will come through a gun. You might fire ten bullets and they would all vary. There would be some slight variation in the bullet, unless it was a perfect gun.

Well, take six bullets, say, three bullets fired from the Sacco gun, how would they appear different from those fired from any other gun, in so far as scoring would be concerned?—The bullet that comes from the Sacco gun that I fired were practically perfect and clean-cut lands.

In that connection I will call your attention to Government Exhibit 36, purporting to be three bullets fired by Capt. Van Amburgh from the Sacco gun. Will you examine those and say whether there are any marks on those bullets by which they can be identified as coming from the Sacco gun by reason of any imperfection in the barrel caused by pitting or fouling of the rifling of the barrel?

[Witness examines bullets] No, sir, not positive of it.

MR. KATZMANN. What is that answer.

THE WITNESS. It could not be positively done.

Why not?—In my experience in shooting of all these different bullets through guns the bullets vary so, the marks on the bullets vary so, it is impossible, and particularly with the Sacco gun, the pitting there is so slight that it does not mar the bullet very much and you have a perfect muzzle. My cast showed that." [1425]

Asked about the shells, he asserted that flow-back was common. [1419] "It will show plain with one cartridge," he said, "and it won't with another," depending, it appears, on the pressure. The off-center of the firing pin he laid to the looseness of the shell. [1420]

On cross-examination he would not say that bullet No. 3 was not fired from a Colt pistol [1431]. Asked to find distinctive pitting at certain places in the pistol and cast, he could not do so [1440–1444], although he said there was a "mass of them, slight to the eye": [1442]

"I am calling your attention to that particular pitting. What made it?—Can I answer that in my own way?

Don't you like my question?—No. There are so many pits there that it is pretty hard to tell which one made it and you are assuming it made that one there [indicating], and that wouldn't,—I wouldn't want to answer that question.

You wouldn't like to answer that one, would you?—No, indeed, that is out of the question to answer that question.

MR. JEREMIAH MCANARNEY. I did not hear you, please.

THE WITNESS. It is out of the question to answer that question because there are so many pits, and he is trying to identify one pit. [1441] . . .

How do they compare?—Why, you can make them compare.

They do compare, don't they?—Yes, and they have got the same thing on other lands.

I am not asking you about other lands. I am asking you about that one.—If you wish to stretch——

I am not wishing to stretch anything. How do they compare?—I won't answer that question.

Why not?—Because you can't tell. I wouldn't state that that groove came from that same,— or that land was the same groove.

Did you find on examination of the grooves in the cast which correspond to the lands in the barrel, do you find a collection of pits similarly placed with respect to any other barrel land on that cast?—Oh, they are all around it.

That isn't the question, now. Wait a minute, Mr. Burns. Will you take the question as I put it?

THE COURT. Mr. Burns, kindly pay attention to the question, for it is about adjournment time.

[The question is read.]

THE WITNESS. There is a space, but I won't—I wouldn't want to place it to that identical spot." [1443]

He was questioned further about the widening at the top of the grooves in the Lowell Winchesters and replied that there was on these no perceptible widening such as in bullet No. 3:

"Did you then notice any widening of the bullet groove at the upper end on those Winchesters?—Not perceptible, no. Nothing to compare with bullet No. III. . . .

Is there a widening on those two bullets that have been shown you, at the upper end of the two grooves I called to your attention?—Not perceptible to me.

You mean by that you can't see it?—I mean I can't see it.

With the glass either here at this light or over at the window? Do you tell this jury you don't see any widening at the upper end of those two grooves that I called to your attention?—Not what you would call widening, sir." [1451]

Mr. Katzmman asked the jurors to examine the bullets with a microscope. Burns said that, in the U. S. bullets fired at Lowell, there was a cleaner cut at the base than in bullet No. 3, this being due to the fact that there is a greater upset or explosion in a bullet with a hollow base than in one with a flat base [1452, 1453]. (The Winchesters used at Lowell had flat bases; bullet No. 3 and the U. S. bullets used by Burns at Lowell had hollow bases. [1460])

On cross-examination Burns was not asked about the shells.

J. HENRY FITZGERALD, the other expert for the defense came from the Colt factory in Hartford:

"What is your present employment?—I have charge of the testing room at Colt Patent Firearms Company of that city.

Is that where this automatic pistol is made?—At Colt's factory, yes, sir.

How long have you been connected with the gun business?—About 28 years.

Prior to going with the Colt people, whom were you employed with?—By Iver Johnson Company, in Boston.

The Iver Johnson Company?—In Boston.

What was your work there?—I had charge of the revolver department.

How long were you in charge of the revolver department at Iver Johnson's?—I don't remember exactly. Somewhere five to six years. I don't exactly remember.

Prior to that five or six years' work where were you employed?—At Manchester, New Hampshire.

In the gun business?—In the gun business, sporting goods, general merchandise." [1464]

Fitzgerald expressed the opinion that Bullet No. 3 had not been fired from Sacco's pistol:

"In substance, repeating my former question, are you able to form an opinion,—were you able to form an opinion as to whether bullet No. III was fired from Exhibit 28?—I was.

What is your opinion?—My opinion is that No. III bullet was not fired from the pistol given me as Exhibit 28.

Kindly now explain to the jury the reasons that you have for that opinion.—The land marks on the No. III bullet do not correspond, in my best judgment, to bullets I have seen fired from this pistol.

In what way do they differ?—The land marks on the No. III bullet show a slippage at the top or front of the land mark on the bullet, and it isn't pronounced in the same way on the bullets I have seen.

How many bullets have you seen that were fired through—— —Three that I examined.

And what three were they, please?—The three I understand fired by Mr. Van Amburgh at Lowell. . . .

And whether,—what is the condition of that throat with reference to whether its condition is such as would cause a bullet to jump the lands?—I find no condition in this barrel that would cause a bullet to jump the lands as shown in bullet No. III.

On the photograph. Now, what causes the bullet to jump the lands?—A rusty or corroded lead would cause that." [1466]

He explained the off-center indentation from the firing-pin in the shell as due not to anything in the pistol, but to the anvil in the primer. He also said that flow-back was to a certain extent common in all guns and that it resulted from pressure:

"Mention has been made here that there appears in shells fired to be what has been called a flow-back of the metal of the primer. State to what extent that exists.—Why, that was nothing strange. That exists in all guns to a certain extent. It depends a great deal on the hardness of the primer.

Does it in any way,—is it brought about in any way by the amount of percussion?—By the pressure, yes. Ten to fifteen thousand pounds in the gun before me.

Whether that is a common or uncommon thing to find in shells, such as are used in these automatics?—It is a common thing to find.

From your examination of bullet No. III, are there any indications on that bullet which you can say now from your examination that are caused by any pitting of the gun, Exhibit 28?—You mean in this gun? [1467]

Yes.—I can see no pitting marks on bullet No. III that would correspond with a bullet coming from this gun." [1468]

On cross-examination, Fitzgerald was asked to compare the Fraher Winchester shell and the three Winchester shells fired at Lowell. He found differences in all, and said that the flow-back in the Fraher shell did not compare with that in the others [1472]. He was asked to look at the ridges on the shells and said they were not all similar:

"How does the flow-back on the Fraher shell, a Winchester, compare with the flow-back on the three Lowell Winchesters?—I do not think it does compare.

Is it not the same?—No, sir.

Do you say, Mr. Fitzgerald, that in the Fraher shell there is not a clear-cut, well-defined, narrow flow-back that is characteristic of the [1472] three Winchester shells fired at Lowell that is not present in the three Peters fired at Lowell, a marked lip at each indentation that is absent from the three Peters fired at Lowell?—There is no mark in this so-called Fraher shell that I could identify with the marks on these three shells.

MR. JEREMIAH MCANARNEY. What are those three shells?

THE WITNESS. There is a flow-back on all of them.

Yes, there is a flow-back in all of them, but is there any difference in the characteristic outline of the flow-back?—There is a difference in these three.

Is there any common difference between the Peters at Lowell and the Winchesters at Lowell?—There is a difference in the three Peters. They are not the same. They don't show the same mark.

Don't the Fraher shell and the three Winchesters fired at Lowell show two concentric rings at the indentations, the indentation ring itself and a narrow lip around it outside?—[Witness examines] Those three don't show the same mark." [1473]

Fitzgerald failed also to find any definite pittings in the cast of the Sacco pistol. [1475–8]

No expert evidence was submitted by the prosecution in rebuttal, al-

though Mr. Katzmann at the conclusion of the testimony given by the defense experts said he would submit such evidence. [1482]

The reader will observe that the defendants' experts were not asked to express an opinion on whether the Fraher shell had or had not been fired through the Sacco pistol, and that both thought the features emphasized by the prosecution experts as showing similarity of this shell with the Winchester shells fired at Lowell either did not exist, or were of common occurrence. Both denied that bullet No. 3 had been fired through Sacco's pistol, claiming that the pitting in the Sacco barrel was not definite enough to account for the markings on the mortal bullet.

The chief differences of opinion between the experts related to the ridges on the shells and to the widening at the top of the grooves in the mortal bullet. All four agreed that the indentations from the firing-pin were on all the shells slightly off-center.

In Mr. Moore's summation his only reference to the experts consisted in the statement that the jury should hesitate before taking a human life when the users of a microscope could not agree. [2147]

Mr. McAnarney argued that Van Amburgh pointed to conditions for his opinion which he admitted were not unusual. [2167]

Mr. Katzmann asked the jurors to examine the bullets and the cast of the barrel of the pistol; he discounted Fitzgerald as a witness because of Fitzgerald's inability to understand what Katzmann meant by widening on the bullets. He pointed out that Van Amburgh was not relying on conditions such as flow-back, referred to by McAnarney as not unusual, [2225] but that what he was relying on was the pitting in the barrel which caused the scoring on the grooves of the bullets which the jury themselves could see on the Winchesters fired at Lowell and on bullet No. 3. [2227]

Katzmann argued that Burns' reasons contradicting Van Amburgh's opinion were based on his use at Lowell of U. S. bullets instead of Winchesters and that it was due to the choice of this make that the bullets showed no widening such as was on both the mortal bullet and the Winchesters fired at Lowell, widening which could be seen by the jury with their eyes [2226]. At no place did he refer to Proctor's testimony or even mention his name.

In his charge Judge Thayer said:

"Now, the Commonwealth claims that there are several distinct pieces of testimony that must be considered upon the question of personal identification. Let us see what they are. First, that the fatal Winchester bullet, marked Exhibit 3, which killed Berardelli, was fired through the barrel of the Colt automatic pistol found upon the defendant Sacco at the time of his arrest. If that is true, that is evidence tending to corroborate the testimony of the witnesses of the Commonwealth that the defendant Sacco was at South Braintree on the 15th day of April, 1920, and it was his pistol that fired the bullet that caused the death of Berardelli. To this effect the Commonwealth introduced the testimony of two witnesses, Messrs. Proctor and Van Amburgh. And on the other hand, the defendants offered

testimony of two experts, Messrs. Burns and Fitzgerald, to the effect that the Sacco pistol did not fire the bullet that caused the death of Berardelli." [2254]

In his opinion of December 24th, 1921, the Judge argued that the defense, by suggesting the experiments with Sacco's pistol, had recognized the importance of the subject. He pointed out that the jury had examined the exhibits [5551] and declared it was not for him to decide which experts should be believed nor what the jurors saw. [5552]

The whole subject of Proctor and the bullets was extensively reconsidered in the Fifth Supplementary motion for a new trial filed April 30th, 1923 [3539], the reconsideration being based chiefly on an affidavit of ALBERT H. HAMILTON of October 15th, 1923 [3635]. Hamilton, a criminologist of thirty-seven years' experience, had been called in 165 homicide cases, generally on behalf of the prosecution [3608, 3609]. He had been employed on this matter by Moore in March [3611] and had examined all the exhibits under a compound microscope [3612]. He submitted an album of photographs taken by Mr. Turner [3613, 3732 a-z] which were described by Van Amburgh as "excellent". [3657]

It is hardly possible to summarize the contentions in the various affidavits submitted on this motion. It is important, however, to note that Hamilton pointed out that there was no basis for the prosecution's claim at the trial that the off-center position of the firing-pin indentation on the Fraher-Winchester shell, F4, and on the shells of the Lowell test Winchesters showed them all to have been fired through the same pistol. Hamilton established that the indentation on F4 was not, in fact, off-center [3618]; and this was substantially conceded by Van Amburgh [3654]. Van Amburgh claimed, however, that the variation between the shells was of no importance and that if a large number of shells were fired through the Sacco gun they would show wide variations [3653-3654]. On the hearing of the motion Judge Thayer refused to permit additional firing with that pistol. [3728]

Hamilton further pointed out an imperfection in the firing-pin of Sacco's pistol which registered in the three Lowell Winchester shells in such a way that they were quite differently marked from the Fraher-Winchester [3619, 20]. Van Amburgh and a new expert for the prosecution, MERTON A. ROBINSON, of the Winchester factory disputed this difference and produced measurements of the ridges on all four shells. They showed slight variation throughout [3655, 3656, 3676]. Different markings on the face of the shells due to file scratches on the bushing of the gun were discussed by all the experts, with results which, to the outsider, seem inconclusive [3621-3624; 3656-3660, 3676. See photographs, 3732 j, r]. The marks from the ejector on the base of the shells were similarly discussed [3624, 3625; 3662-3666. See photographs, 3732 b, c, k]. On this occasion Hamilton and Robinson expressed definite contradictory opinions about the Fraher shell's, F4, having been fired through Sacco's gun. [3618; 3655; 3676]

On the subject of the bullet, measurements made by Hamilton and by Professor Gill of the Institute of Technology were submitted by the defense, and those made by Van Amburgh, by the prosecution. As microscopic measurements vary with atmospheric conditions, a direct comparison of the measurements of the three men is of no value. Each set of figures should be examined separately, particularly those given by Van Amburgh, because they were used by the prosecution as its chief basis for the contention that Sacco's pistol fired the mortal bullet. [See photographs, 3732 g-i]

Gill made measurements on two different dates, which differed from each other on account of changes in atmospheric conditions. On the second date he made two measurements each, of both the pistol and the mortal bullet. Some of these results show slight discrepancies for which no explanation was offered. He said he made them without knowledge of the connection between the various exhibits or the purpose for which the results were to be used [3638]. In a later affidavit he explained differences between his results and Hamilton's by pointing out that they had measured the exhibits at different places and added that he had not as much skill in making measurements as had Hamilton, his work of August having been his first experience at measuring bullets [3650].

Gill and Van Amburgh measured some of the Lowell test bullets too; but it is impossible to tell whether they both measured the same ones. As the form in which these various measurements appear in the record makes comparison somewhat difficult the figures are here presented in a uniform table:

Hamilton [3629, 3630]

		<i>Mortal Bullet</i>	<i>Sacco Pistol</i>
Land	1	.050	.050
Groove	2	.1000	.1050
Land	3	.0512	.045
Groove	4	.1025	.1050
Land	5	.0525	.050
Groove	6	.1050	.1025
Land	7	.050	.0475
Groove	8	.1000	.1025
Land	9	.050	.050
Groove	10	.1025	.1025
Land	11	.050	.0475
Groove	12	.1025	.1050
Land Average		.0506	.0483
Groove Average		.1021	.10375
Totals		.9162	.9125

Van Amburgh [3663, 3664]

		<i>Mortal Bullet</i>	<i>Sacco Pistol</i>	<i>Lowell Bullet</i>
Land	1	.0533	.0527	.0529
Groove	2	.1039	.1056	.1058
Land	3	.0544	.0505	.0531
Groove	4	.1045	.1050	.1047
Land	5	.0543	.0525	.0535
Groove	6	.1036	.1058	.1047
Land	7	.0534	.0507	.0537
Groove	8	.1050	.1050	.1050
Land	9	.0524	.0519	.0522
Groove	10	.1032	.1058	.1068
Land	11	.0532	.0523	.0507
Groove	12	.1047	.1059	.1054
Land Average		.0535	.0517	.0527
Groove Average		.1041	.1055	.1054
Totals		.9459	.9437	.9485

Gill (August 14, 1923) [3639, 3640]

		<i>Mortal Bullet</i>	<i>Sacco Pistol</i>	<i>Lowell Bullet</i>
Land	1	.0487	.0500	.0525
Groove	2	.1000	.1075	.1025
Land	3	.0500	.0500	.0500
Groove	4	.0975	.1075	.1000
Land	5	.0500	.0515	.0525
Groove	6	.0987	.1080	.1025
Land	7	.0487	.0510	.0500
Groove	8	.0987	.1075	.1000
Land	9	.0500	.0500	.0500
Groove	10	.0962	.1075	.1000
Land	11	.0492	.0492	.0500
Groove	12	.0962	.1075	.1000
Land Average		.0494	.0503	.0508
Groove Average		.0979	.1076	.1008
Totals		.8839	.9472	.9100

Gill (September 25, 1923) [3639, 3640]

		<i>Mortal Bullet</i>		<i>Sacco Pistol</i>		<i>3 Lowell Bullets</i>		
		<i>(two measurements of each)</i>						
Land	1	.0507	.0520	.0562	.0562	.0528	.0528	.0520
Groove	2	.1038	.1040	.1048	.1056	.1056	.1072	.1056
Land	3	.0512	.0512	.0568	.0568	.0528	.0520	.0520
Groove	4	.1020	.1040	.1056	.1064	.1040	.1056	.1056
Land	5	.0515	.0504	.0562	.0562	.0528	.0512	.0528
Groove	6	.1040	.1024	.1064	.1040	.1040	.1056	.1056
Land	7	.0512	.0512	.0562	.0568	.0520	.0520	.0528
Groove	8	.1032	.1032	.1064	.1056	.1056	.1048	.1056
Land	9	.0512	.0512	.0568	.0562	.0528	.0520	.0528
Groove	10	.1040	.1040	.1075	.1064	.1040	.1056	.1056
Land	11	.0512	.0512	.0562	.0562	.0528	.0520	.0528
Groove	12	.1040	.1040	.1056	.1069	.1056	.1056	.1056
Land Average		.0512	.0512	.0564	.0564	.0527	.0520	.0525
Groove Average		.1035	.1036	.1060	.1058	.1048	.1057	.1056
Totals		.9280	.9288	.9747	.9733	.9448	.9464	.9488

(Totals and averages were in some cases given in the record; in others they have been calculated by the writer.)

These measurements show a greater variation between the mortal bullet and the Sacco pistol than they do between the latter and the Lowell test bullets, known to have been fired through it. Van Amburgh's averages show the lands of the mortal bullet as .0018 inch more than those of the pistol, whereas the Lowell bullet was only .0010 inch larger. The difference in the grooves is more considerable; the test bullet was .0001 of an inch smaller than the pistol, the mortal bullet .0014 smaller. Gill's averages show similar differences. The circumference of the mortal bullet is, according to Van Amburgh, nearer to the measurement of the inside of the pistol than is the test bullet; Gill's measurements of the totals place the test bullets nearer the pistol than those of the mortal bullet. The totals, of course, indicate nothing by themselves, since if the variations in measurement of the separate lands and grooves offset each other the totals would tally, no matter how different the separate measurements. (As, for instance, if each land and groove of one bullet measured .050 and .105 respectively, and of another, .060 and .095, both totals would be .9330.)

The figures show how inconclusive such measurements are and how superficially the matter had been handled at the trial. Both prosecution experts had there testified that the lands of the mortal bullet measured .060 [893, 915] and Van Amburgh that the grooves were .107 [915]. Burns was much nearer to the measurements later made under the higher power microscope, with .105 for the grooves and from .050 to .060 for the lands.

Hamilton found on the bullets fired at Lowell certain double land marks which were different from those on bullet No. 3 [3631]. Van Amburgh

agreed as to the difference but said the matter had no significance [3665, 3366]. Both experts compared certain marks or scores on the various bullets with divergent opinions [3646-3648; 3668-3670] and Robinson also gave measurements of these scores which are inconclusive and inconsistent with each other [3676]. Van Amburgh submitted photographs taken by a certain Ekman [3667] which have not been reprinted in the Holt publication. They were evidently criticized on the hearing of the motion; and affidavits were thereafter filed on the subject by both Van Amburgh [3683] and Hamilton [3686-3689], the latter pointing out that the lands and grooves had been made to appear in the photographs as of the same size, a result which could not have been accomplished except by manipulation of the focus of the camera. [For Hamilton's photographs see 3732 l, n, r, s, t]

Judge Thayer, in his opinion of October 1st, 1924, rejected Hamilton as a witness on account of his over-enthusiastic willingness to assist the defense, pointing in support of this rejection to his affidavit about the age of ink marks:

"This motion depends very largely upon the affidavits of Mr. Hamilton and I have therefore given them my best consideration, and this consideration forces me to the conclusion that his greatest weakness is found in his overenthusiastic willingness to adapt himself to almost any condition that may arise within his line of professional inquiry. To show what I mean by this expression of 'ever-enthusiastic willingness' let me refer, by way of illustration only to a portion of his affidavit of the Ripley motion.

"Of course it was important on that motion to establish that certain ink marks were placed upon the Vanzetti bullets by some of the jurors, although there was no evidence of that fact, but Mr. Hamilton under oath gave his opinion on this subject as follows: That the affiant has examined the entire trial record in the above entitled case insofar as the same bears upon the history and introduction of the said so-called Vanzetti cartridges, Exhibit 32 and his examination of said four ink marks and is of opinion that said ink marks in each of them were placed upon said bullets after said cartridges went into the jury-room and before they were returned by the jury to the sheriff. The ink marks as a matter of fact must have been on the bullets for more than a year and a half before Mr. Hamilton saw them, and yet, notwithstanding this fact, he made oath that he could tell the day and the place that said shells were marked and the persons (the jury) who marked them. This is to give an illustration of what I mean by his 'over-enthusiastic willingness' in his cause." [3712]

In his brief on appeal, Mr. Thompson accused the Judge of unfairness in so treating Hamilton:

"But Hamilton said [p. 43] [3577]:

"Having in mind the duty of the sheriff not to mark or in any wise change the character of any exhibits entrusted to his care, and assuming and believing that the said sheriff performed his duty, and having in mind the points of identity as between these said two so-called Vanzetti cartridges and their bullets, and certain of the so-called Ripley cartridges and their bullets, the affiant is of opinion from the examination of the said four ink

marks and from all of his knowledge of the said so-called Ripley cartridges and of his knowledge of the entire condition of this trial record, that the said four parallel ink marks were placed on the said two so-called Vanzetti cartridge bullets at a time after the said two cartridges were taken into the jury-room and before the return of the verdict herein.'

"In the light of this statement, the unfairness of the Court in charging Hamilton with having said that he could tell to day *from the appearance of the ink marks alone* when they were placed upon the Vanzetti bullets is palpable. We submit with all due respect that such a method of dealing with the testimony of a serious and highly competent expert witness betrays a total (though doubtless temporary) lack of judicial competence and fairness." [4118]

Dealing with the shells, Judge Thayer pointed out that the experts for the defense had not testified at the trial to the particular individuality in the Sacco firing-pin [3718], an individuality not then noticed, yet later undisputed. The Court, however, fails entirely to note that at the trial it was assumed all four shells showed similar off-center indentation. The prosecution claimed that this was proof they had been fired through the same gun, while the defense considered it a usual matter and not indicative of anything. By use of a high power microscope it was ascertained by Hamilton that the underlying assumption was false, since on the Fraher shell alone the indentation was actually off-center. This point was admitted substantially by Van Amburgh [3654]. And it disposes of the Judge's argument. It can fairly be said the experts somersaulted, using whatever arguments would fit the facts to their theories.

As regards the other matters relating to the shells, Judge Thayer, after noting disagreement between the experts, refused to accept Hamilton's claims because his own observation of the shells left him unconvinced and because he was unwilling to attribute perjury to the prosecution's experts:

"The experts cannot agree upon this question and, in fact, they seem unable to agree upon any single material and important issue.

"Why is it that they cannot agree? In cases of such tremendous importance can we attribute perjury or malice to these two men, both of whom were selected by the United States Ordnance Department at Washington during the late war,—Captain Van Amburgh, whose duty it was to test the ballistic properties of cartridges and to daily test and observe the Colt automatic pistol made by the Colt's Patent Firearms Company, and [3721] Mr. Robinson, who was appointed by said Ordnance Department on a special commission to study the methods of small arms manufacture in the prominent plants throughout England, France, and Italy? So far as I am concerned I cannot force myself to come to that conclusion. I, therefore, find that Mr. Hamilton's claim on this issue has not been sustained, and, therefore, the burden of proof that the law placed upon these defendants has not been maintained." [3722]

Judge Thayer made several references to the mortal bullet itself. He said that its measurements had at the trial been fully considered:

"Since the trial, two new witnesses have appeared (Mr. Hamilton and

Prof. Gill) who have affirmed that from their measurements of said land marks and grooves, the said mortal bullet was not fired by the Sacco gun. Evidence of these measurements having been introduced by both parties at the trial, it would seem that the new evidence of Prof. Gill was sub-[3710] stantially and fully inquired of at the trial. The jury had at the trial the fullest opportunity to pass judgment upon this testimony introduced by both sides." [3711]

This statement ignores completely the very superficial and erroneous character of the testimony on this subject, a character which has already here been commented upon.

There was absolutely no discussion in the opinion of any of the matters developed on the motion relating to the bullet itself, although nine pages were devoted to a discussion of the Fraher shell.

On the appeal from this decision, the Supreme Judicial Court said:

"The granting of a new trial on the ground of newly discovered evidence, as has been said repeatedly, rests on sound judicial discretion. *Commonwealth v. Green*, 17 Mass. 514, 535, *Commonwealth v. Borasky*, 214 Mass. 313, 322. *Commonwealth v. Dascalakis*, 246 Mass. 12, 24. We do not perceive anything tending to show that the judge's discretion was exercised improperly in the denial of this motion. The photographic and microscopic examinations and experimental tests set forth in the affidavits of the defendants' experts, which include, among other things, a minute description of Sacco's pistol and the alleged new hammer in the Vanzetti revolver which [4351] were exhibits at the trial, were evidence only for the judge's consideration. Even if they were not opposed by counter affidavits, the judge had heard the evidence at the trial, and his declination to follow the defendants' experts cannot be classed as error of law. There was no error in the refusal of the requests. There is nothing in the exceptions to the findings or statements in his very full decision. The reasoning on the evidentiary value of the affidavits and other references to the history of the case were not rulings of law which were subject to exception. *Davis v. Boston Elevated Railway, supra*." [4352]

Judge Thayer reopened the subject in his opinion filed on October 23d, 1926 denying the Medeiros motion. He pointed out here that the jury had sent for a magnifying glass, probably in order to examine the shells [4765]; that the firing-pin on the gun showed a gouge which on the shells appeared as a ridge, and that by the use of a strong magnifying glass he had found these ridges similar on each shell. He said also that the experts had testified that on account of marks on bullet No. 3 and on the Lowell Winchesters in their judgment, "it was perfectly consistent with their [sic] being fired thru the Sacco pistol" [4766]. Here it is evident the Judge meant all four bullets were "consistent" with having been fired through the pistol: as three of them had been fired through it, he must have used the word "consistent" as expressing a positive opinion. In other words, here is Judge Thayer, several years after the Proctor incident has been called to his attention, using the very word "consistent" in exactly the sense in which Proctor intended it should be understood at the trial. This is made all the more certain because

the judge speaks of "experts" and makes no distinction between them. Clearly both Proctor and Van Amburgh did not testify in the same way if "consistent" meant only "might have."

Although Turner and Hamilton both appeared before the Lowell Committee no evidence was taken on this subject. When Turner started discussing it [5226], President Lowell said: "That, of course, is expert testimony which we have read" [5227].

The report of the Lowell Committee justified Judge Thayer's denial of the Hamilton motion:

"An inspection of the photographs, following the reading of these affidavits for the defendants and for the Government, leads us to the conclusion that the latter presented the more convincing evidence. We are of opinion, therefore, that the Judge could not properly have ordered a new trial on the Proctor motion." [5378r]

In discussing the evidence in general the Committee said:

"Moreover, when Sacco was arrested he had a pistol which is admitted to be of the kind from which the fatal bullet was fired. In the controversy between the experts, one side striving to show that the bullet must have been, and the other that it could not have been, fired through that pistol, we are inclined from an inspection of the photographs to believe that the former are right; if they are, there could be little or no doubt—even if there were no other evidence—that the owner of the pistol fired the shot. But even if we assume that all expert evidence on such subjects is more or less unreliable, we can be sure that the shot was fired by the kind of pistol in the possession of Sacco." [5378w]

d. The Cartridges Found in Sacco's Possession

In discussing the question of Sacco's guilt or innocence the Lowell Committee said:

"Then again, the fatal bullet found in Berardelli's body was of a type no longer manufactured and so obsolete that the [5378w] defendants' expert witness, Burns, testified that, with the help of two assistants, he was unable to find such bullets for purposes of experiment; yet the same obsolete type of cartridges was found in Sacco's pockets on his arrest. . . . Such a coincidence of the fatal bullet and those found on Sacco would, if accidental, certainly be extraordinary." [5378x]

To understand the statement a review of some of the evidence will be necessary.

From Sacco's pockets twenty-three bullets were taken by officer Merle A. Spear [781]. These were mixed with the nine in Sacco's Colt and turned over to Captain Scott (who never testified). Of the thirty-two six were Winchesters [783]. Captain Proctor received from Scott these thirty-two bullets [887]. He described the fatal bullet (Exhibit 18, bullet No. 3) as a Winchester, having a "cannon lure" (meaning cannellure) [893]. A cannellure is a series of knurls or indentations running around the bullet slightly above the nose.

Van Amburgh was not positive that bullet No. 3 was a Winchester, saying that the letter W he had found on it was "almost—very good proof". [916]

Nothing was said by either of these witnesses about the age of the cartridge nor about its being of obsolete manufacture; nor was either of them asked to compare any of the cartridges found in Sacco's possession with bullet No. 3.

Defendants' expert, James E. Burns, identified No. 3 as a Winchester weighing 74 grams [1408]. On cross-examination it appeared that the bullets which Burns used in the Lowell tests were not Winchesters, but U. S. bullets [1428]. Burns explained the reason for this by saying: That bullet No. 3 was a hollow-base bullet, with knurls and cannon lure, not of recent manufacture; that the most recent manufacture of Winchesters, like those used by Van Amburgh at the test, were smooth, having no cannon lure; and that the U. S. bullet was the nearest thing he could get to the old Winchester [1437]. Burns had tried to get the old type between Dedham and Lowell [1435] but had not tried to get it at the Winchester factory [1436]. Fitzgerald, the other expert, was asked nothing whatever on this subject. Nor were the defendants' experts questioned about the Winchesters found in Sacco's possession.

No mention was ever made at the trial of any similarity between these cartridges of Sacco's and bullet No. 3. Mr. Katzmman, who tried the case with great skill and thoroughness, either never noticed any similarity or else thought such likeness a matter of no importance, for he did not comment on it in his summation. He spent some time discussing the bullets and the testimony of Burns [2223–2228]; he commented on the latter's claim that bullet No. 3 was of old manufacture [2226] and on the fact that Sacco was armed when arrested, mentioning the number of cartridges in his possession [2203], but he made no comparison between bullet No. 3 and any bullet that had been Sacco's. Nor did Judge Thayer in any opinion refer to such similarity, although he did, on several occasions, seek to justify the verdicts by extensive discussion both of the evidence and of the inferences which might be drawn from it.

The only suggestion that there might be any such similarity is found, curiously enough, in the affidavit of Hamilton, verified October 15th, 1923, which was the basis for the fifth supplementary motion for a new trial. Moore, apparently, had asked Hamilton in March, 1923, to ascertain whether the so-called mortal bullet had been discharged from a cartridge of the same date of manufacture as any of the cartridges found in Sacco's possession [3611]. What prompted Moore to ask that question does not appear in the record. It was probably the fact that the six Winchesters among the 32 cartridges which Sacco had had showed those indentations or knurls which also existed on bullet No. 3, and which are described by the term "cannon lure." These would, of course, be visible to the naked eye and easily noticed by a layman.

Hamilton, in discussing the question put to him by Moore, described the

six Winchesters alleged to have been found in Sacco's pocket as having in fact such cannellure with knurls as had the mortal bullet [3634]. He reached the conclusion that these six bullets could not have been manufactured at the same time as the fatal bullet, since on the former the cannellure was exactly perpendicular whereas it was three degrees off perpendicular on the fatal bullet [3635]. The prosecution's expert, Robinson, ballistic engineer at the Winchester factory, [3673] disputed Hamilton's reasoning and explained the failure of bullet No. 3 to show perpendicular knurling by its deformity [3674] and not by the manufacture, since all bullets, said he, are manufactured with the knurls parallel to the axis [3675]. His reasoning was accepted by the Lowell Committee [3538x]. It should be noted, however, that Robinson expressed no opinion on Hamilton's conclusion regarding the relative ages of the Sacco Winchesters and bullet No. 3, and that he said nothing about the obsolete character of any of these bullets.

Hamilton made some tests using six Winchester bullets "of the same make as the mortal bullet and manufactured within less than twelve months of the date of manufacture of the mortal bullet" [3631]. The photographs of these show the same cannellure as does the mortal one. [3732n] Where Hamilton procured these six bullets and how he knew when they were manufactured does not appear, but his statement with regard to them was not challenged by the prosecution, an omission which seems to throw doubt on the suggestion in the Lowell report that these bullets were so obsolete they could not be obtained. It is true, as the report of the Lowell Committee states, that Burns and his assistants could not find any. Yet this fact may throw doubt merely on their assiduity, as Katzmann himself, indeed, suggested at the trial.

Before leaving the subject Sacco's own testimony should be considered; and in so considering it it should be borne in mind that, at the time his testimony was taken, the point had not been made that there was any similarity between the age or type of the mortal bullet and of those found in his possession. On direct-examination he stated that he had bought the bullets in 1917 or 1918 [1858]. On cross-examination he said they had not been bought in a new, unopened box [1895], although at Brockton he had told Katzmann that he had bought a new box of cartridges. He admitted now that this was not the truth and explained the falsehood on the ground that he had not at the time remembered [1900]. He actually bought two boxes, one in Milford and one in Hanover Street. The bullets found on him came from the box bought at the time of the war in Hanover Street, when the seller mixed some cartridges together and handed him a box so mixed. [1902]

Briefly summarized, the facts are: the mortal bullet, No. 3, and the six Winchesters found in Sacco's possession had cannellure and were of a type no longer made in 1921, nor readily found in certain localities, but still obtainable, apparently, in 1923; Sacco bought his cartridges in 1917 or 1918 and got a mixture of different makes from the dealer; it was not noticed at the trial that there was any similarity between the mortal bullet and these Winchesters of Sacco's, nor was this commented on either by Katzmann in his

summation or by Judge Thayer in any of his opinions.

No evidence was produced at any stage of the proceedings to show when the Winchester factory stopped making these bullets. However, in a letter written to the author, the Winchester Repeating Arms Company stated that this type of bullet was last manufactured on August 16th, 1917. The company pointed out that it could not determine for how long thereafter such bullets were to be found in dealers' stocks.

The conclusion of the Lowell Committee that, if accidental, the similarity in bullets is an extraordinary coincidence, does not, however, seem to be justified. There does not seem to be sufficient basis for supposing that these bullets were all manufactured during approximately the same general period. The prosecution's expert, Robinson, made no attempt to establish such a fact. For all that appears the bullets found in Sacco's possession might have been manufactured in 1910 and the fatal bullet in 1917, since their only point of resemblance seems to be the cannellure. Nor would it be in the least remarkable had the bandit had some old cartridges on hand.

e. Summary

It may reasonably be assumed that the fatal bullet was fired through a Colt pistol. The suggestion that the exhibit produced at the trial was a substitution can hardly be accepted without more support than the analysis of the subject affords. That analysis, however, casts doubt upon the accuracy of the observation of all the eyewitnesses and upon the correctness of the conclusion of the prosecution's experts that all five other bullets had been fired through the same pistol. It is also clear that until the trial itself was under way the prosecution was not prepared to prove that the mortal bullet had been fired through Sacco's pistol. Captain Proctor evidently had told of his inability to find any evidence to support such claim. Apparently Mr. Katzmann concluded to make this charge when advised by Van Amburgh of his opinion reached as the result of the experiments at Lowell. He based this opinion on measurements, the details of which were not given at the trial, and on scoring or rifling marks. Both he and Proctor noticed a similarity between a Winchester shell found at the scene of the crime and Winchesters fired through Sacco's pistol at Lowell, but neither actually stated his belief that the first shell had also been fired through the Sacco pistol.

That these experts for the prosecution had, in their observation and measurements, lacked exactness became evident as the result of Hamilton's researches for the defense. The fact relied on with respect to the shells—that the firing-pin indentation of the Fraher shell was, like those of the test bullets, off-center—was finally admitted to have been incorrectly observed; actually this shell instead of being like the test shells in that particular was unlike. Likewise the measurements made after the trial by Hamilton, Gill and Van Amburgh, confirmed rather the measurements given at the trial by the experts for the defense than those of the experts for the prosecution.

A comparison of these later measurements of the mortal bullet with the measurements of the test bullets and of Sacco's pistol made at the same time by the same expert reveals one almost universally uniform condition. The deviation from the pistol of the mortal bullet is, in nearly each instance, markedly greater than is the deviation from the pistol of the test bullets. The average, according to Van Amburgh, shows, for the lands: .0517, .0527, .0535—for the grooves: .1055, .1054, .1041. [The order being pistol, test bullet, mortal bullet.]

As to the points in controversy other than measurements, such as double land marks and scores on the bullets, little can be said from a mere study of the record. The photographs relied on by the Lowell Committee seem to the author, at least as reproduced in the Holt publication, of little assistance. They certainly establish a variation in the double land marks as claimed by Hamilton. Whether, as argued by Van Amburgh, this variation lacks significance is not for the lay person to say.

It can hardly be doubted, however, that with the elimination of Proctor's testimony and the more exact consideration of the subject necessitated by Hamilton's observations an entirely different picture of the bullet issue would have been presented to a jury had a new trial been granted. No one can say whether the result would have been different, nor what would have been the effect upon such new trial of the argument of the Lowell Committee based on the similarity in age of the mortal bullet and Sacco's own Winchester. The more one studies this complicated question of bullets the more is one inclined to agree with Mr. Katzmann's original position: that there was not enough proof to justify the contention that the mortal bullet was fired through Sacco's pistol.

III

DID THE CAP FOUND AT THE SCENE OF THE CRIME BELONG TO SACCO?

THE prosecution produced at the trial a cap with earlaps found some hours after the shooting at the scene of the crime. It claimed Sacco had worn this cap and had left it behind him. Attention was called to a hole in the lining which the prosecution argued had been caused by sticks on which Sacco was in the habit of hanging his cap in the factory where he worked. Sacco admitted that he used to hang his own cap on such sticks but denied that the cap produced at the trial was his or that he had ever owned a cap having earlaps. He tried the disputed cap on before the jury and contended that it did not fit; Mr. Katzmann, the District Attorney, argued in his summation that it had fit.

Two other caps were produced, one of which had been taken from the defendant's home after his arrest, and was, at the trial, marked Exhibit 27, later, 43; the other one, called Exhibit 44, had been purchased by counsel to serve as a basis for comparison. The disputed cap was introduced in evidence as Exhibit 29.

At the trial this disputed cap was identified by FRED L. LORING, an employee of Slater & Morrill, as the one he had picked up at the scene of the crime shortly after the shooting and turned over to the superintendent, Fraher. He said it was in "just the same" condition at the trial as when he had picked it up [798]. His attention was not, however, called to a hole in the lining. On account of objection by counsel for the defendants, since it had not been in any way connected with Sacco, this cap was not at that time marked in evidence. [800]

On cross-examination Loring said that before he reached the scene of the crime he had seen approximately forty people in the street [801]. He thought they had all had hats on, but he was not sure whether every man had had either a hat or a cap. [802]

The witness FRAHER was asked nothing about the cap; nor was its subsequent history in any way accounted for at the trial. Properly to consider the importance of some of the testimony it becomes necessary to consider as much of this history as is known.

At the hearings held by the Lowell Committee in 1927 appeared JEREMIAH F. GALLIVAN, chief of police of Braintree from 1905 to 1926 [5166]. He said that, on the Saturday morning after the crime (which took place on a Thursday), Fraher had telephoned him asking that he come over; and that upon his complying, Fraher had given him a cap which, he told him, someone

had picked up "last night" [5169]. Gallivan had made a hole in the lining and had ripped it to see if he could find inside it marks of identification. Having no police headquarters, he had kept the cap under the seat of his automobile; and, almost ten days later, he had turned it over to Officer Scott [5170]:

"Did you hear while you were attending that trial that Mr. Katzmann was making some claim that the torn lining was due to its hanging on a nail in Kelley's shop?—I heard that. The Governor asked me that question the other day, he says to me, and it kind of upset me and it made me a little bit peeved, he says to me, 'You had a cap under your seat in the car?' I says, 'Yes.' 'Did you consider that a good place to carry it?' 'I didn't have any other place to carry it.' 'Did you see a hat mark or a rack mark inside it?' I said, 'A rack mark? I never heard of such a thing as a rack mark.' 'You did not see it?' I says, 'No, I never heard of such a thing. All I know is that I tore that lining in that hat, I know that, that I tore that through. I don't know about that other that you speak of.'

You don't know when that cap was actually picked up, if it was ever picked up, or by whom it was picked up, do you?—No.

Did you ever tell the District Attorney when you heard this that you were the one that tore the lining?—No, sir. I never heard that until here within a short time. I didn't hear it at the time of court, but I heard it later, within a short time.

JUDGE GRANT. [Addressing the witness] Didn't you say that there was a little hole?

THE WITNESS. I said I started to make a little hole to see if I could start it, and I didn't make much headway and I tore it more.

PRESIDENT LOWELL. [Addressing the witness] There was a little hole?

THE WITNESS. No. I started to make a little hole to get onto the inside to see what was between the lining; the lining was sewed onto the hat. If I remember, there was some wool around here [indicating] and I was trying to get that out through the hole that I made myself. There wasn't a hole in the hat, I made a hole, I was trying to get that out through the hole that I made myself. That lining was perfectly whole when that hat was given to me.

There was no indication in the lining of that hat or cap of anybody having hung it on a nail or any other place?—If there was I [5171] didn't see it. If there was I would have told about it. The Governor could not understand it, he says, 'I don't care what you did, but did you see a hook mark in it,' and I says, 'No.' " [5172]

On cross-examination Gallivan said he did not know whether he had ever told Katzmann or Williams about having torn the lining of the cap, but that he did know he had told Officer Scott about it [5181]. He had talked with neither Katzmann nor Williams at the trial, as this had been a job for the State Police [5182]. When interviewed by the Governor shortly before the hearings of the Lowell Committee the witness had expressed it as his

opinion that a cap found on the day after the crime had had no relation to the crime but had been the property of someone in the town. [5182]

“[By Mr. Ranney.] Who was the first person you told about having torn it?—Have you got all through asking me questions or are you going to start over again?

I will ask you some more. Apparently, Mr. Gallivan, you seem to take a hostile attitude towards representatives of the Commonwealth.—No, I do not. There’s a right and a wrong to this thing, that’s all there is to it.

Who was the first person you told about this cap having been torn by you?—John Scott, I guess.” [5183]

Mr. Thompson stated that information regarding this witness, Gallivan, had come to him during the preceding few days from a newspaper reporter and that it had been confirmed over the telephone by Gallivan [5183] who had shown himself unwilling to go into details. [5184]

Mr. Katzmann said before the Lowell Committee that he had never heard Gallivan had torn the lining of the cap and that, had he heard it, he would have explained that fact to the jury, but would still have used the cap had there existed other means of identification, such as color. [5077]

In connection with Gallivan’s testimony to the effect that Fraher telephoned him on Saturday about the cap, it should be noted that at the inquest held at Quincy on this Saturday, the 17th, Fraher made no mention of a cap’s having been found [408*–413*]. Contemporaneous press accounts indicate that the cap was picked up on the 16th, or perhaps late on the night of the 15th.

Officer Scott did not testify before the Lowell Committee nor had he been a witness at the trial.

In his opening address at the trial Williams, Assistant District Attorney, stated the prosecution would produce witnesses who knew the kind of cap Sacco had been in the habit of wearing and said the cap found at the scene of the crime was similar to Sacco’s [76]. The only such witness was GEORGE T. KELLEY, superintendent of the shoe factory at which Sacco had worked. He said Sacco had sometimes worn a dark cap of a salt and pepper design which he had hung on a nail [852]. He was shown the cap picked up by Loring and said it was similar to Sacco’s in color only. He did not know whether or not anything had happened to Sacco’s cap because it had been hung on a nail. He examined the lining shown him and found it torn:

“What kind of head gear was Sacco accustomed to wear, if you know?—There were times that he wore a cap. There was other times he wore a hat.

What kind of a cap have you seen him wearing?—I have seen him wear a dark cap.

Could you describe it any more than that?—I do not know as I could go into it in detail, outside of knowing that it was a dark cap.

Well, have you in talking it over with anybody, described it in any different terms or more in detail than that?—I have said of a salt and pepper design.

How was it in regard to anything else? Can you tell us anything further in regard to it that you recall?—No, sir.

What have you seen in regard to this cap, if anything?—Nothing more than coming in to work and hanging it up on a nail [853]. . . . The only thing I could say about that cap, Mr. Williams, from hanging up on a nail in the distance, it was similar in color. As far as details are concerned, I could not say it was.

You have been shown that cap before?—Yes, sir. Of course, you realize that inside there (indicating) the earlappers, and so forth, I never had any way of examining that cap to see if the ear laps were in there. The only method I had of looking at the cap from observation was if it hung up on a nail somewhere, just passing by and knowing whether it was black, white or green.

Do you know if anything had happened to Sacco's cap by reason of it being hung up on a nail?—By reason of what might occur?

Do you know if anything had occurred to his cap by reason of being hung up on a nail?—No, sir.

Have you examined the lining of this cap?—I did.

What do you notice to be the condition of the lining?—Torn." [854]

Upon objection by Mr. McAnarney to the offer of this cap in evidence the following took place:

"THE COURT. I would like to ask the witness one question: whether,—I wish you would ask him, rather,—according to your best judgment, is it your opinion that the cap which Mr. Williams now holds in his hand is like the one that was worn by the defendant Sacco?

MR. MOORE. I object to that question, your Honor.

THE COURT. [To Mr. Williams.] Did you put it? I would rather it come from Mr. Williams. Will you put that question?

Mr. Kelley, according to your best judgment, is the cap I show you alike in appearance to the cap worn by Sacco?—In color only.

THE COURT. That is not responsive to the question. I wish you would answer it, if you can.

THE WITNESS. I can't answer it when I don't know right down in my heart that that is the cap.

THE COURT. I don't want you to. I want you should answer according to what is in your heart.

THE WITNESS. General appearance, that is all I can say. I never saw that cap so close in my life as I do now.

THE COURT. In its general appearance, is it the same?

THE WITNESS. Yes, sir.

MR. MOORE. I object to that last question and answer.

THE COURT. You may put the question so it comes from counsel rather than from the Court.

In its general appearance, is it the same?—Yes.

MR. WILLIAMS. I now offer the cap, if your Honor please.

THE COURT. Admitted.

MR. MOORE. Save an exception.

MR. JEREMIAH McANARNEY. Save an exception.

[The cap is admitted in evidence and marked "Exhibit 29."]

MR. WILLIAMS. [Passing Exhibit 29 to the jury.] Notice the outside and inside. You may inquire.

[By Mr. Jeremiah McAnarney.] Well, you said you never saw this cap before?—I did not say any such thing." [857]

On cross-examination Kelley said Sacco had had two caps but that he did not know which one he had been wearing in April. [863]

The same witness was later recalled on behalf of the defense. Another cap had in the meantime been marked for identification, Exhibit 27 [1929]. This was the one Officer Guerin had found in Sacco's kitchen after the arrest [2093]. The witness was shown both caps and asked which looked more like the one he had seen in his factory. Kelley thought Exhibit 27 bore more resemblance to Sacco's than did the disputed cap, Exhibit 29 [2003, 4]. On cross-examination he said that neither of them was of what he called salt and pepper design [2007]. On redirect-examination he said the cap he had referred to on his original examination had been of a heavier and fuzzier material:

"Taking the two caps, your answers with reference to both, is there any explanation you want to make with reference to your testimony about either one of those caps?—Either one of those caps does not come up to my idea of salt and pepper, either one of them.

Kindly explain what you mean?—The cap I had reference to as salt and pepper in my testimony was a heavier, fuzzier material with black, white, green set right out there prominent, and soiled, dark in color from being soiled." [2008]

On further cross-examination Kelley said:

"When you testified here in the court room, Mr. Kelley, you had that dark cap before you, didn't you?—Yes, sir.

You examined it with care, didn't you, Mr. Kelley, before you testified?—Yes, sir.

Did you realize the importance of your testimony in regard to that cap?—In the truth only.

Of course, in the truth. I mean, did you realize the importance if your testimony identified that cap as Sacco's cap?—I did not think I had identified it, Mr. Katzmann.

I said if you identified it did you realize the importance when you were testifying about the cap?—Yes." [2009]

He was also questioned about an interview with the police concerning his opinion of this cap:

"They asked you to give a definite answer, 'Is it or is it not his cap?'—Yes, they asked me.

Didn't you reply on each occasion, 'I have my opinion about the cap, but I don't want to get a bomb up my ass'?—That part I can't remember.

Do you say you did not say that?—I said the last part there. I might have said it when they drove off, but not at the time when they showed me the cap.

Was that in reference to the cap?—Yes.

When you made the remark?—Yes, surely." [2010]

It appeared on further examination by Mr. Moore that the witness had during the trial noticed a cap on the table in the ante-room and had called counsel's attention to it [2011]. That was his idea of a pepper and salt cap, he had said, and the nearest thing he had seen to Sacco's cap, just the mixture of goods. (It was marked as Exhibit 44 for identification) [2012]. "That is just what is my ideal of the cap that I had in my mind, absolutely." [2013]

Mr. McAnarney called the jury's attention to the hole in the disputed cap Exhibit 29, "as to whether it is caused by hanging on a nail or something else." [2014]

ROSE SACCO was shown these caps:

"You say Exhibit 27 looks more like your husband's cap?—Yes.

Did your husband ever wear a cap like that, '29,' this cap? Did he ever have a cap like that?—My husband never wore caps with anything around for his ears, never, because he never liked it and because, besides that, never, he never wore them because he don't look good in them, positively.

He don't look good in them?—No, I don't like him.

Well, now, his other cap, the one that we brought the other day, it is hard to examine about that. I won't examine about that until we try to locate it, anyway. You say this one is the cap that looks more like your husband's cap?—Yes, it looks something like my husband's cap, and I don't think this [indicating] is my husband's cap.

Did you ever see a mark like this [indicating], you might or might not, but did you ever see a hole like that [indicating] in your husband's cap?—Not that I remember. I never seen holes in my husband's cap like that.

Might be and might not.—Not." [2065]

SACCO himself, when shown the Loring cap, Exhibit 29, testified:

"By the way, Mr. Sacco, there has been introduced in evidence here a cap that is marked Exhibit 29. Is that your cap?—[Witness examines cap.] I never wear black much. Always a gray cap; always wear gray cap. Always I like gray cap.

MR. MOORE. That is not an answer to my question. [1850]

MR. KATZMANN. I ask that answer be stricken out. The question is, is it your cap, not what color he wears.

THE WITNESS. No, sir.

THE COURT. The other answer may be stricken out.

Do you know anything about that cap?—No, sir, never saw it.

Did you ever have a cap of any color made in that form with the fur lining?—Never in my life.

See if this is your size.—[Witness puts cap on head.] The way I look. Could not go in. My size is $7\frac{1}{8}$.

THE COURT. Put that on again, please.

[The witness places cap on head again.]

THE COURT. That is all.

Do you know anything at all about the history of that cap, where it came from or who it belongs to, anything about it?—No, sir." [1851]

The defendant recognized a cap produced by counsel as one he had bought in March, 1920. He had also had another cap which was taken by the police [1851]; this cap Mr. Katzmann did not have on hand at the time defendant's counsel asked him for it [1852]. On cross-examination Sacco was shown a cap, not in any way described as to its origin, and asked whose it was:

"—It looks like my cap.

Yes. Did you have such a cap as that in your house at the time of your arrest?—Yes, sir, something like.

You think it is.

MR. KATZMANN. Did you speak, your Honor.

THE COURT. No.

MR. KATZMANN. Oh, I thought you spoke.

THE WITNESS. I said, 'something like.'

Isn't it your cap?—I think it is my cap, yes.

Well, wait a minute, please. Look at it carefully, will you?—[Witness examines cap.] Yes.

There isn't any question but what that is your hat, is there?

THE COURT. 'Cap,' you mean.

MR. KATZMANN. Cap.

No, I think it is my cap.

MR. JEREMIAH MCANARNEY. I don't hear you.

MR. KATZMANN. 'No, I think it is my cap.'

Will you try that cap on, please, and watch yourself when you put it on, just how you put it on?—[Witness does so.]

Will you turn around so the jury can see, all the way, please?—[Witness does so.]

The other side, this side. Is there anything you want to say? Did I catch you as wanting to say something? I thought perhaps you did.—I don't know. That cap looks too dirty to me because I never wear dirty cap. I think I always have fifty cents to buy a cap, and I don't work with a cap on my head when I work. I always keep clean cap. Right when I go to the factory, take all my clothes off and put overalls and jump. It looks to me pretty dirty and too dark. Mine I think was little more light, little more gray.

Is that your hat?

THE COURT. Confine it to cap.

MR. KATZMANN. I beg your pardon.

Is it your cap? I should not say 'hat.' Cap?—I think it is. It looks like, but it is probably dirt,—probably dirty after.

When you had it on, was that buttoned or unbuttoned when you just put it on?—It was buttoned.

Put it on again and keep it buttoned, will you, please?—Sure. [Doing so.]

On pretty hard?—No, well, all right.

All right. Now, will you try—— —Not very loose.

Not very loose?—No.

Will you try Exhibit 29 on, and use the same amount of force [1928] in putting it on that you used in putting that hat on?—Yes. [Doing so.] Can't go in.

Can't go in?—No.

Try and pull it down in back and see if it can't go in?—Oh, but it is too tight.

What is the difference in size between those two hats?—I don't know, but it looks that is tight to me.

Is it any tighter than that hat?—Yes, lots.

Lots tighter?—Yes.

You are sure of that?—I am pretty sure. I can feel it.

You can feel it?—Yes.

Is there any difference in the weight of material between the one that I now hold in my left hand and the one you have on your head?—Lots of difference.

Yes. Now, assuming that they are the same head size, would one seem any tighter than the other because of the difference in the weight of material?—I don't say if it is material.

Look at the hats themselves. Any difference in head size between them?—It has more material over there inside than this." [1929]

Sacco examined the hole in the lining of this cap, Exhibit 27, and said he had never seen it before. He had kept his cap hung on two sticks in the wall through which he had put a nail. [1929, 1930]

Both Sacco and Mrs. Sacco were shown a hole in the lining of Exhibit 27, the cap taken by the police from Sacco's house; but Guerin, who took the cap, was asked nothing about the hole, merely answering in the affirmative the routine question whether it was in the same condition as when he took it [2093]. What he did with it after he took it did not appear. Sacco and his wife were not asked about the hole in Exhibit 29, the cap found at the scene of the crime. Kelley had been shown only the hole in this last cap. [854]

Neither Moore nor McAnarney in their summation referred to the caps.

Katzmann argued¹ that Sacco had "falsified to you before your very faces," having denied ownership of the cap which Guerin had taken from his home. Mr. Moore objected to this statement, [2209] whereupon Mr. Katz-

¹ See pp. 85, 86.

mann referred to part of the testimony, commented on the time Sacco took in looking over the cap and said of Sacco's final testimony, that the cap looked too dirty: "Isn't it a denial?" [2210]. This was a misstatement of the testimony, since doubt about the cap played a small part only, and since Sacco's last statement was "I think it is. It looks like, but it is probably dirt—probably dirty after" [1928]. Katzmnn claimed that the cap found at the scene of the crime fitted Sacco as well as did the one taken from his home and asked the jury to try on both the caps. [2210]

Mr. Katzmnn made no mention of the hole in either, although it is probable he had been about to do so when he was interrupted by Moore; for he had just said that the reason why Sacco denied his own cap was "because this cap that was picked up by—" [2209]. It seems as though he had intended saying that the cap picked up at the scene of the crime had had the same hole in the lining as did Sacco's own cap, thus showing that it, too, had belonged to Sacco and had hung on the nail in the factory. In the light of Gallivan's statement that he had made the hole in the questioned cap, can it be supposed that the police made a similar hole in the cap taken from Sacco's kitchen to make the identification certain, or was there really a hole in that cap, too, denied by the Saccos, for fear that an admission would tie them up with the other cap? Had Gallivan's testimony been given at the trial, it might well have had far-reaching effects.

Judge Thayer in his charge briefly referred to the testimony of both sides as raising a question of fact and evidence to be considered against Sacco only. [2256]

In the opinion of December 24th, 1921, denying the motions for a new trial made on the minutes, Judge Thayer, after reviewing the evidence, said the Commonwealth claimed that the holes in the lining of the cap had been made by the nail on which Sacco hung his cap in the factory. He said also that the cap fitted Sacco when he tried it on [5555]. (He may only have meant to say that the Commonwealth so claimed.) The opinion of October 1st, 1924, on the Gould motion merely referred to the existence of the disputed question of fact [3517]. In denying the Medeiros motion on October 23d, 1926, Judge Thayer again referred to the claim of the Commonwealth that the holes in the lining were made by the nail on which Sacco kept the cap, and stated that the Supreme Judicial Court had said this constituted competent evidence tending to prove it was Sacco's cap. [4765]

The holes in the caps had not been referred to by the Supreme Judicial Court; the admission of the cap and the summation of the District Attorney had been approved:

"But the identification of Exhibit 29 as the cap of Sacco, found under the circumstances already stated, was a question to which the attention of the witness was specifically directed and whatever he said at any stage of the case before and after his answer to the question as to 'its general appearance' goes only to the weight to be given by the jury to his entire testimony. The position taken by the trial judge did not go be-

yond the legitimate bounds of inquiry. *Commonwealth v. Kennedy*, 170 Mass. 18. The question properly was left to the jury under instruction not excepted to [4331] . . . The jury were to pass on evidence appearing in the record from which more than one inference of fact could be drawn, *Lindenbaum v. New York, New Haven & Hartford Railroad*, 197 Mass. 314, and the argument did not exceed the reasonable rights of the Commonwealth to comment on the credibility of the testimony of Sacco which was left to the determination of the jury. The case at bar does not come within *London v. Bay State Street Railway*, 231 Mass. 480, in which the statement of counsel for the plaintiff in his argument to the jury—that they were making the law for the county in which the case was being tried—was left uncorrected by the judge after his attention had been called to it by counsel for the defendant; nor does it come within *Commonwealth v. Cabot*, 241 Mass. 131, where the assistant district attorney repeatedly told the jury that one of the defendants had said that the defendants were going to raise a technical defence which apparently was intended to convince the jury that such a defence was unjustifiable, although the defendants had a legal right to make it. This exception is groundless." [4333]

Mr. Thompson argued before the Lowell Committee the importance of Gallivan's testimony regarding Sacco's cap. He said that, had this testimony been known to the jury, no more would have been heard of the cap [5295]. Mr. Ranney, in answer, remarked that the testimony presented a "very important and a very disturbing question" because it was Gallivan's duty not to tamper with evidence. He argued that a man who would admit such a dereliction of his duty was not entitled to much credence, and said that George Kelley had not paid much attention to the torn lining. [5338]

The latter statement is only partially true. Kelley did not pay much attention to the lining, but Williams, who was examining him, asked him if he knew whether anything had happened to Sacco's cap by reason of its being hung upon a nail [854]; and Sacco, on cross-examination, was made to describe how he had made two sticks and put a nail into them for his hat to hang on [1929, 30]. It is quite clear that the matter was driven home to the jury.

The Lowell Committee said the cap found at the scene of the crime resembled "in color and general appearance" those Sacco wore; that "when tried on in court it fitted,—that is, his head was the size of one of the men who did the shooting" [5378w]. In fact Kelley was the only witness who was asked if this cap resembled Sacco's. While a single answer affirmed the resemblance mentioned by the Committee, Kelley's testimony in its entirety does not seem to justify so simple a statement. That the cap fitted when tried on is supported by no testimony. Indeed, from contemporaneous press reports, it is very doubtful whether it did fit. The very language of the Lowell Committee's report appears to rest the inference that the cap fitted merely on similarity of head size. On this subject there also seems to be no testimony. Assumption that the cap belonged to one of the murderers

rather than to one of the crowd which came to the scene immediately after the shooting is without support in the evidence and is disputed by Gallivan.

The Lowell Committee accepted Gallivan's statement about the hole in the cap but said it "is so trifling a matter in the evidence in the case that it seems to the Committee by no means a ground for a new trial" [5378v]. No attention was paid by the Committee to the use of this hole on the trial nor to its effect in determining the identity of the cap.

We have, then, a cap picked up after a crowd had gathered, described reluctantly as like Sacco's in general appearance by a witness who said it did not resemble Sacco's in material, and who picked out a quite different cap as most nearly approaching the image in his mind; a cap which, at the trial, was given false importance because the hole in its lining was believed made by the nail on which Sacco had hung his cap and because a similar hole existed in a cap admittedly Sacco's.

Mr. Katzmann contended before Judge Thayer on the first motion for a new trial that the jury had the right to convict on the cap alone, if they thought it was Sacco's [5295]. The inferences drawn from the existence of the hole in this cap may well have exerted a dominating influence upon the jury; however, since Gallivan made this hole there was no foundation for any such inferences.

IV

THE RELATION BETWEEN THE REVOLVERS OF VANZETTI AND BERARDELLI

THE prosecution argued that the revolver found on Vanzetti when arrested was the one which Berardelli, the murdered guard, had been carrying at the time of the shooting and that Sacco had picked it up and given it to Vanzetti. There was no direct evidence that Berardelli had been carrying any particular gun on the day of the crime, nor was there produced at the trial any evidence at all that Berardelli had been seen to drop his gun or that any of the bandits had picked one up. It was established, however, that Berardelli had carried at some time before the shooting a 38 calibre Harrington & Richardson revolver and that this gun had been left for repairs to its hammer less than a month before the fatal event. Vanzetti's revolver was likewise a 38 Harrington & Richardson. The prosecution claimed that it also had had its hammer repaired. It had five chambers and was fully loaded.

Vanzetti contended that he had purchased his gun two or three months before the arrest because the times were dangerous, there having been many hold-ups. He was corroborated in his statement as to the date of the purchase by a number of persons who testified to their earlier connection with the same revolver.

No record of the number of either weapon had been kept by any of the people through whose hands the guns had passed.

VANZETTI testified that he had bought his revolver from his friend, Falcini, about two or three months before his arrest:

"Why did you get the revolver?—I got the revolver because it was a very bad time, and I like to have a revolver for self-defense.

How much money did you use to carry around with you?—When I went to Boston for fish, I can carry eighty, one hundred dollars, one hundred and twenty dollars.

What do you mean by 'It was a bad time'?—Bad time, I mean it was many crimes, many holdups, many robberies.

Many holdups?—Yes.

Do you remember what you paid for the revolver?—I think \$5." [1715]

The day after his arrest, in his statement to Mr. Katzmann, Vanzetti, (as he admitted on cross-examination), said he had owned the gun a long time, and had bought it about four or five years previously in Hanover Street [1749]. He claimed that he had lied about it to shield his radical friends.

"Do you remember my then asking you:

'Q. You know whether it was hot weather or winter, don't you?'

And your reply:

'A. I think it was in the spring time. I can't tell you exactly honest.'

Did you say that?—I don't remember.

Will you say you did not say that?—I don't want to say I did not say it. I do not remember if I said it or not.

If you did say it, Mr. Vanzetti, is it true?—It was not true that I buy,—was bought so long ago.

Do you remember my then asking you:

'Q. Don't know the name of the store?'

And your answer:

'A. No.'

—Yes, I remember that.

Was that true?—Well, it was true that other that I do not remember, because I do not remember, because I never bought in the store.

Then the statement you previously made that you bought it in a Hanover Street store was untrue, wasn't it?—Yes.

Do you remember my then asking you:

'Q. How much did you pay for it? A. \$19, or something like that. Eighteen.' Did you say that?—I don't remember.

Will you say you did not say it?—No, I do not say I did not say it.

If you said it, Mr. Vanzetti, was it true?—No, sir.

Mr. Vanzetti, is there any reason connected with collecting literature that made you say on May 6th to me that the revolver cost you \$19, when it cost you only five, as you now say?—No, there is no reason. [1750]

Then, Mr. Vanzetti, when you talked with me, there was at least one thing that you told me that had nothing to do with literature, wasn't there?—It is the same report of the literature to tell you.

Would it make any difference to you, Mr. Vanzetti, in the literature that you were talking about, if you said the revolver cost you five instead of saying it cost you nineteen?—That has nothing to do with the literature.

No.—But what I tell you about the revolver has the same report as literature. [1751] . . .

Do you remember this question and this answer I asked you at Brockton, referring to the purchase of your revolver:

'Q. What name did you give when you bought it? A. I gave another name but I don't remember.'

Did you say that to me at Brockton?—Yes, sir.

Was that true or false?—It was not true.

'Q. Why didn't you give your own name? A. I was scared.'

Did you make that answer to me?—I don't remember, but if I have gave it, it is wrote there, I made you at that time.

If you made it was it true or false?—It was false. When I say the first thing false I have to say everything false.

MR. KATZMANN. I ask that be stricken out, if your Honor please.

THE COURT. It may be.

THE WITNESS. On that line." [1797]

He said the bullets in the revolver when he was arrested were the same ones that were in it when he bought it and that he had never had any others [1798]; and he did not remember having said at Brockton that he had bought a full box, had fired some of the cartridges and had thrown the box away. Vanzetti admitted that these answers, if given, were false:

"Do you remember these following questions that were asked of you at Brockton and answers were made by you as follows:

'Q. You say, Mr. Vanzetti, that you bought the revolver that the police took from you last night about four years in Boston, and you think it was in the spring time, somewhere on Hanover Street. Now, where did you get the cartridges to go into that revolver? A. I took at that time in the same place.'

Did you say that to me?—I don't remember.

Will you say you did not?—No, sir, I don't think so.

If you said it, was it true or false?—It was false.

Do you remember the next question:

'Q. One box? A. Yes.'

Did you make that reply?—Possibly. I don't remember.

If you made it, was it true or false?—Yes it was not true.

It was not true. Do you remember the question as follows:

'Q. A full box, unopened, no cartridge taken out? A. Yes, just a full box.'

Did you make that reply?—Maybe.

If you made it, was it true or false?—It was false.

Do you remember the question:

'Q. Did you ever buy another box? A. No.'

—It may be.

Do you remember that?—No, I do not remember.

It is true you never bought another box, isn't it?—I never bought neither that box that I told you about.

All right. Do you remember this question:

'Q. Did you ever fire off any of those cartridges? A. When I buy that, yes.'

Did you make that reply to me?—I don't remember, but it can be.

Will you say you did not?—No, no.

If you made it, was it true or false?—False.

Do you remember the next question:

'Q. How many?' referring to your firing off.

'A. I shot sometime ago on the beach or on the water.'

Do you remember that?—No.

Was it true or false?—It was false.

Was that helping you to conceal the names and addresses, Mr. Vanzetti?—I don't say I bought that by Falzini." [1799]

He admitted that attempting to deceive the District Attorney as to the kind of box the cartridges had been in would not have helped conceal the

names of his friends [1802]. He was not sure whether or not he had said at Brockton that there were six cartridges in the revolver. He was shown his revolver, Exhibit 27, but could not recognize it and had noticed no marks upon it. [1800]

No attempt was made to prove that Vanzetti had made the various answers at Brockton about which he was uncertain.

LUIGI FALZINI said he had sold to Vanzetti in January or February, 1920, a revolver which in October, 1919, he had bought from Orciani and which he recognized as Exhibit 27 [1629]. He knew it by scratches on the right hand and some rust:

"Before I forget it, how do you know that is the revolver you had?—I recognize from those scratches on the right hand of the revolver, this little rust,—over here on the right hand.

What make was the revolver that you sold to him?—H. R. Arm Company, I think. . . .

Point out to us the mark that you saw on the gun.—Right one here (indicating), and over there, a little rust. . . .

How do you know that is the revolver?—With the intention,—that is, I did not put much attention to this gun before, but I have seen the gun. That is, I did examine it, not intentionally.

How do you know that is the revolver that you sold to Vanzetti?—Well, because of this scratch here and a little rust here as I pointed to." [1630]

On cross-examination he said he had never fired the gun off. Vanzetti paid him five dollars which was what the gun had cost him. He said there were six chambers in the revolver, which he had never either loaded or taken apart. He had happened to notice the scratch when he bought the gun:

"Were there any other scratches on the revolver besides the one you pointed out?—I never paid any attention.

How did you happen to see this scratch you pointed out to the jury?—Well, as I looked at the revolver and I twisted and turned it around I saw that mark.

When was that?—The time that I bought it.

Did you ever look at it again to see the scratch?—No, sir, I never. I bought it that day and I saw it then and I did not see it any more. I did not look at it any more.

And you always remembered that scratch?—Yes, particularly a scratch there which I used it as a mark.

What did you use it as a mark for?—Well, because he talked about it when I bought it, and I spoke about the mark.

Were there any other marks near that mark?—No, sir, and I remember there was none.

Do you remember that mark very distinctly?—Yes.

Got a very clear picture of it in your mind?—I got it in my mind." [1631]

Examining the gun the witness noticed that there were scratches on the left side also. [1633]

RICARDO ORCIANI who had been apprehended and suspected of complicity in the crimes but let go almost immediately after his arrest did not testify, although Falzini and two other witnesses said he was somewhere about the court house during the trial [1016, 1191]. This fact was commented on by the District Attorney in his summation [2187, 2229] as justifying an inference by the jury that Orciani's testimony would have been unfavorable to the defense¹ [2233]. The last comment was unsuccessfully objected to by defendants' counsel and became a point on the appeal [4341, 4342]. The Supreme Judicial Court held it was permissible for the District Attorney to comment on the failure of the defendants to call a witness whom they would reasonably be expected to call and who was available.² [4343]

REXFORD SLATER of Dexter, Maine, who had formerly lived in Norwood, Mass., recognized Exhibit 27 as having belonged to his mother-in-law, Mrs. Mogridge, about three and a half years earlier [1635]. She had brought it with her from her home in Maine to Norwood and had sold it to him with its case for about four dollars [1639]. He had kept it in the house, fired it a few times and sold it to a fellow workman, Ricardo Orciani, for four dollars [1636]. He identified the case by a knob and a tear, and the gun by enamel that was off on one side:

"What is there about that revolver by which you now say it is the revolver you sold to him?—Well, the enamel on the gun that I sold was off from the end of the barrel; also over the cylinder.

Over the cylinder. You say 'cylinders.'—Over the cylinder.

Do you mean one or both sides?—Well, that [indicating] is the cylinder, as far as I know. Well, I never noticed only one side of the gun. I don't know. I can't remember which side it was. I know it was gone or started off from one side.

Any other way you can tell?—No.

I assume from your answer no other way, that you did not notice the number on the handle?—I did not. I do not know the number." [1637]

On cross-examination he thought he had sold the gun late in the fall of 1919 [1638]. He had not noticed that both sides of the barrel showed lack of plating:

"Did you at any time when you had it open for the purpose of cleaning notice that both sides of the barrel showed a lack of nickel plating?—Both sides of the barrel?

Yes.—No, sir.

What?—No, sir.

Now, will you please examine that gun and see if there are any marks on it now that were not on it when you bought it and when you owned it, if that is the one you owned?—[Witness examines gun.] Yes, sir.

¹ See Part I, pp. 86, 87.

² See Part I, pp. 121, 122.

Where?—One behind the trigger guard.

Where is it?—Right here [indicating].

Apparently a cut right across?—Yes.

Were you told before you took the stand that that mark was on the gun?
—No, sir, I was not.

Are there any other marks?—I beg your pardon. I was [1640] . . .

Did you ever see any other gun that has been fired as much as you know that gun has been fired to have bright nickel at the end of the muzzle?
—I don't know. I never saw any revolvers that have been fired as many as that one.

Then, do you know whether that gun is any different from any other gun that has been similarly discharged?—No, sir.

Do you know if the gun differs from any other gun of the H. & R. make, .38 calibre, that has been discharged as much as that has, with respect to loss of nickel at either side of the barrel?—Why, no, I don't know.

Then how can you say that is the gun?—Well, I can say that is the gun because it has those places gone, and I don't think another gun would.

I thought you said you did not know how another gun would appear?
—I don't know for sure.

Then you don't know for sure that is the gun, do you?—Well, it looks exactly like it. [1641] . . .

Do you mean you do not know whether you have any doubt? That is the question, sir. Have you any doubt but that a gun of the H. & R. manufacture, .38 calibre, fired as frequently as that one, would look the same? Have you any doubt about that?—[Witness hesitates.] Why, I don't see why it should.

Why should it not?—I don't know why two guns that have been used some certain length of time should look just alike.

Do you know why they should look any different?—Yes.

Why?—Different usage

I said used the same, and you said used the same, didn't you?—Well, there is no two guns used the same.

Assume that two guns have been used the same.—Can't do it.

You can't assume that?—No, sir.

Why not?—Because they wouldn't be used the same.

Why couldn't they be used exactly the same, any two guns of that manufacture?—Because they couldn't.

Why not?—Well, one man would not have two guns just alike.

Did I say anything about one man having two guns?—Two men never use two guns alike.

You know that to be a fact, do you?—I know it through rifles, and probably it is the same with revolvers.

I see, you are guessing about it? Is that right?—Well, I know it is so in regard to rifles.

Aren't you guessing when you say that is your own gun you once owned?
—No, sir.

You are sure of that? Are you sure of that, sir?—Well, I am sure the same scars as on the gun I sold, and exactly the same.

I did not ask you that. Are you sure that is the same gun?

THE COURT. Answer the question.

—I am not." [1642]

The gun was identified also by Slater's brother-in-law, ELDRIDGE ATWATER of Dexter, Maine. [1556] He had shot it while it belonged to his father-in-law. He identified it by the nickel worn off on the end of the barrel and over the cylinder, but noticed the left side only [1557]. The last time he had seen the gun it had been in the possession of his mother-in-law after his father-in-law's death, about five years earlier [1558]. He identified the case also, but on cross-examination admitted this might not be the original one. [1559]

He said Exhibit 27 was worn off on the right side nearly as much as on the left but he did not remember having noticed that fact on the Mogridge gun. [1564, 7]

"Can you identify this revolver from the condition of the muzzle alone?—I did not understand.

Can you identify this revolver from the condition of the muzzle alone?—Why, only that it is more the same as that one was.

Is that any different from any other gun fired the same number of times?—I couldn't say as to that.

Can you identify it from the lack of nickel plating on the left side?—Only that is the way it was when I had it.

Is that any different from any other H. & R. .38 of the same age?—I couldn't say.

Fired the same number of times?—I couldn't say about that.

Then you don't say this is the Mogridge revolver, do you?—I say as far as those two markings, that is the revolver Mr. Mogridge had eight years ago.

What you mean, is it not, as far as those two markings are concerned, they are similar to what was on the Mogridge revolver?—They are just like what was on the Mogridge revolver.

That is all you mean, isn't it?—Yes.

MR. KATZMANN. That is all." [1568]

None of the witnesses knew the number of the gun nor remembered ever having noticed the number. [1561, 1633, 1637]

SARAH BERARDELLI, widow of the murdered guard, testified that her husband had carried a revolver which she thought was like Exhibit 27:

"I will show you that revolver, which is Exhibit 27, and ask you if you have ever seen a gun like that before?—I think I did.

And where have you seen a gun like that?—If I seen just like it? [806]

I say, where? I thought your answer was 'like that.' Now, I ask you

where?—I have seen one that my husband carried.

At some time before the shooting, do you know whether or not your husband had done something with the gun which he carried?—Why, yes, three weeks before he got shot, why, he brought it in the place to have it repaired. . . .

Well, do you know what the matter with the gun was?—Yes.

What was it?—It was a spring broke." [807]

She said the check for the gun had been given to Parmenter, the gun having been lent by him to Berardelli. While it was being repaired the paymaster loaned him another. She did not know whether the gun had been returned by the Iver Johnson repair shop, or not, but she thought that in April her husband had had the same kind of gun with a black handle. [809]

According to a defense witness, ALDEAH FLORENCE, with whom Mrs. Berardelli boarded after her husband's death, [1686], the widow had a few days after the funeral held a conversation with her:

"—Well, three or four days after she came back from the funeral she said, 'Oh, dear,' she says, 'If he had taken my advice and taken the revolver out of the shop he would not be, maybe he would not be in the same condition he is to-day.'

Get the revolver out of the shop?—Out of the repair shop.

Will you repeat that answer? I did not get the middle of it.—She said, 'Oh, dear, if he had taken my advice and taken the revolver out of the repair shop, maybe he would not be in the same condition he is in to-day.'" [1687]

Mrs. Berardelli was not recalled to contradict the testimony of this witness.

An employee of Iver Johnson, LINCOLN WADSWORTH, testified that on March 20th, 1920, he had made a record of a gun brought in by Berardelli [813]. The record was used to refresh his recollection and he said it was a 38 Harrington & Richardson revolver [814]. He was then shown the Vanzetti gun:

"Can you tell the jury whether or not the revolver which was brought in on that date is of the same type and calibre of revolver as the one I have now shown you?

MR. MCANARNEY. To that I object.

That simply calls for a Yes or No answer. Can you tell?—Yes.

You need not answer this until my friends have a chance to object. I am going to ask you whether or not that revolver is the same make and calibre of revolver as the one which was brought in?

MR. MCANARNEY. I object, if your Honor please.

THE COURT. I suppose you are going to show, are you not, later by evidence tending to prove that the revolver in front of the witness was the same revolver that Berardelli had at the time of the alleged shooting?

MR. WILLIAMS. I am, if your Honor please.

THE COURT. With that assurance, the witness may answer.

MR. MCANARNEY. Save an exception.

MR. MOORE. Save an exception.

THE COURT. Certainly. And reserving a right, as in all other matters, to have the evidence stricken from the record if the connection is not made. [815] . . .

Your answer to the preliminary question was Yes. Will you tell us whether or not that revolver which I have shown to you answers the description of the revolver brought in that day?—It does. . . . It is the same calibre and make." [816]

This witness was not cross-examined.

The Iver Johnson repair clerk, GEORGE F. FITZMEYER, testified that his records showed the receipt of two Harrington & Richardson guns between March 19th and 22nd [817]: One was a 32 on which a new hammer was placed [818]. The number of that job corresponded to the number given Berardelli's gun on the records of the receiving clerk [819]. He did not know the calibre of the gun which he had repaired. [820, 1]

Fitzmeyer was asked if repairs had been recently made to Exhibit 27 and said:

"—Well, a new hammer, I should call it, a new hammer.

And how can you tell a new hammer has been put in there?—Well, the firing-pin does not show of ever being struck." [822]

The only cross-examination was to bring out that the witness repaired about 25 or 30 revolvers of various kinds every day. [822]

Another employee of Iver Johnson, JAMES H. JONES, testified that, in accordance with the course of business in regard to returning guns left for repairs, there were periodic sales [823, 834]. He thought the Berardelli gun had been returned to its owner, [824] because it was no longer in the place of business [834] and it had not been sold in a sale of uncalled for revolvers held in February, 1921 [835]. This witness likewise was not cross-examined.

On the appeal various points were discussed in connection with the admissibility of the testimony of the Iver Johnson employees, the Court holding no error had been committed. [4328-30]

Two witnesses testified to having seen Berardelli carry a gun. MISS MARGARET MAHONEY, paymistress for Slater & Morrill, who made up the payroll on April 15th [168], had, within two months or more of the shooting, seen a shining revolver in Berardelli's possession. [170]

JAMES. F. BOSTOCK, who had known Berardelli for some time, had seen a revolver in his possession the Saturday night before the shooting:

"What kind of a revolver was it, do you know?—No, I couldn't tell you

the make of it. I don't know anything about revolvers. It was a 38 calibre revolver, that is all I can tell you. I don't know. I never owned one.

What did it look like?—It was a nickel-plated revolver.

It was 38 calibre?—Yes, sir.

And you saw him have it the Saturday before the shooting?—Yes, sir.

How long, to your knowledge, had he possessed that revolver?—I couldn't tell you. I have seen it with him a number of times. I couldn't tell you how long he had it.

Just roughly?—Probably a month or two. Ever since I worked at the factory. I had been working at the factory there at that time probably two months.

You had known Berardelli during that time?—Yes, sir.

MR. WILLIAMS. Just a minute, Mr. McAnarney, please.

[Mr. Williams shows a revolver to the witness.]

Will you examine that revolver?

THE COURT. May I inquire if there are any bullets or shells in it?

MR. WILLIAMS. It does not look so to me, sir.

THE COURT. Well, I want to know for sure. I remember in another state they did have a very serious accident.

MR. WILLIAMS. There are no bullets in it.

Can you say whether or not the revolver that you saw in Berardelli's possession was similar in appearance to the revolver I now show you?

MR. MOORE. I object, if your Honor please.

THE COURT. Well, on the assurance I have been given, I think I shall receive it.

MR. MOORE. I object to the form of the question.

To the best of your knowledge, belief or recollection, is the revolver that I now show you like in appearance to the one you saw in Berardelli's possession?

MR. MOORE. That I object to.

THE COURT. You may answer.

MR. MOORE. Your Honor will save me an exception?

THE COURT. Certainly.

THE WITNESS. Do you want me to answer?

MR. WILLIAMS. Yes.

—Well, I should say it is a revolver similar to that, yes; that kind of a revolver.

Can you tell us how many shots there were in the revolver which you saw on Berardelli?—No, sir, I could not." [197]

On cross-examination:

"Have you a distinct recollection of anything on that revolver?—No, sir, not one particularly. I couldn't tell it if I saw it again.

And that is the only time you saw it?—Yes, sir. I have seen it a number of times in his possession.

But you couldn't tell it again?—No, sir.

And you don't know whether this is the revolver?—No, sir." [200]

It will be noted from the foregoing account that Mrs. Berardelli said her husband's gun was like Vanzetti's; that Wadsworth said Vanzetti's answered the description of Berardelli's, and that Bostock said the two were similar.

Neither of the experts for the prosecution was asked anything about the hammer in this gun. Both the defendants' experts denied that a new hammer had been placed in it.

JAMES E. BURNS gave as his reason for this opinion the fact that the face of the hammer showed use, it was "case hardened" [1418]. On cross-examination he said that unless the gun had been used more than a hundred times since May, 1920, a hammer then new would not have shown the wear he found [1457]. He did not think the gun had been fired much. [1464]

J. HENRY FITZGERALD said the hammer was as old as the rest of the pistol; it had been fired in use, and showed the amount of wear to be expected from the condition of the gun [1465]. On cross-examination he could not tell what had been done in March, 1920 [1470], but said that the gun did not look as though a new hammer had ever been put in. [1472]

No rebuttal testimony was offered by the prosecution, although at one time Mr. Katzmann said he expected to offer experts in rebuttal. [1482]

On cross-examination Sacco was asked if he had not taken Exhibit 27 from Berardelli's body:

"Did you ever see that gun, that revolver, Exhibit 27, prior to the 5th day of May, 1920?—No, sir.

Did you see it on that day?—The night?

The night, yes.—No, sir.

Did you take that revolver off the person of Alessandro Berardelli when he lay down on the sidewalk in front of the Rice & Hutchins building?—No, sir.

Do you mean that, Mr. Sacco?—Yes, sir, I mean it." [1893]

In summation Mr. McAnarney reviewed the testimony [2168–70] and argued that, had the defense wanted to stoop to falsehood, the witnesses would have been coached to give the number of the gun [2168]. He also commented on the fact that Mrs. Berardelli said her husband's gun had a broken spring [2169] and that the Iver Johnson record showed it was a 32 and the Vanzetti gun was a 38 [2170]. He described this testimony about the gun as camouflage.¹ [2178]

Mr. Katzmann, in his argument to the jury, accused Sacco of having taken Berardelli's gun [2183]. He argued that the recollection of the men from Maine was worthless because any gun would be fouled at the muzzle end. He called attention to Vanzetti's statement at Brockton that he had paid \$16. or \$17. for it and that there were six cylinders in it, which was

¹ See p. 80.

what Falzini had also testified¹ [2229]. He then said "Who knows more about it, the man who put the hammer in or James E. Burns, . . . who never saw the gun until he came into the court room?" [2230]

This constituted a suggestion that Fitzmeyer had testified that he had put a new hammer in Vanzetti's gun, which was, of course, not the fact. Fitzmeyer had testified only that he had put a new hammer into Berardelli's gun and that he thought a new hammer had also been put into Vanzetti's. He was never asked whether he thought Vanzetti's gun was actually the one on which he had worked. He was even ignorant of the calibre of the gun he had repaired. [820, 1]

Katzmann also argued that Bostock's testimony to the effect that Berardelli had had the gun on the Saturday before the shooting discredited Mrs. Florence [2230], the witness who quoted Sarah Berardelli as bemoaning the fact that her husband had not taken his revolver out of the repair shop. Upon Mr. Moore's objection that Bostock had not identified the gun, Mr. Katzmann stated his recollection to be that Bostock had said the gun answered the description of Vanzetti's [2231]. On the next day, before the Court's charge, Bostock's cross-examination to the effect that he could not identify Berardelli's gun was read to the jury. [2238]

Judge Thayer, in his charge, mentioned briefly the putting of a spring and a hammer into the gun, and, at the end of the charge corrected the statement as to the spring [2264]. He referred to the respective claims, stating that the defense experts testified "no new spring and hammer were put into said revolver by the employees of said Iver Johnson Company" [2255]. This charge (although not excepted to), followed Katzmann's error in its suggestion to the jury that the Iver Johnson men had testified to having put a new hammer into Vanzetti's gun.

In his opinion denying the motion for a new trial made on the ground that the verdict was against the weight of the evidence, Judge Thayer reviewed the testimony on this subject. He stated that Vanzetti's revolver had been identified by the Iver Johnson foreman "by the new hammer that he himself put into it." As has already been pointed out there was no such testimony. The Judge in this opinion called attention to Vanzetti's change of testimony regarding the price paid for the revolver, as justifying the jury in believing he did not know the value of the gun and had never bought it. [5554]

In connection with the fifth motion for a new trial, ALBERT H. HAMILTON, in his affidavit of October 15th, 1923, examined the question of the alleged new hammer in the Vanzetti revolver and made a microscopic examination of the various screws. He came to the conclusion that the screw holding the hammer in place had never been removed because there were no scratches to be seen "such as would ordinarily accompany and be the result of the removal" [3613]. Photographs of the revolver and screw heads were submitted [3732 c, d]. The affidavits submitted by the prosecution did not dispute Hamilton's statement; nor did they in any way discuss the question of Vanzetti's revolver.

¹ See pp. 86, 87.

Nevertheless Judge Thayer, in his opinion (Oct. 1st, 1924) denying the motion, rejected Hamilton's conclusion and reasoning, pointing out that, as the screw had been put into the gun at the factory without leaving any mark, it could be so put in again; that it was even possible a new screw might have been used. He commented on the fact that the defendants' experts at the trial had not noticed the importance of the screws. [3722]

In discussing the question of a new trial on the second motion (relating to the testimony of Gould), Judge Thayer, on the same day, said "there were most potent evidence" to the effect that during the shooting this gun was taken from Berardelli [3514]. After reviewing the testimony he referred to Vanzetti's falsehoods, which the Commonwealth claimed were an attempt to account for the possession of a revolver known by him to have been Berardelli's [3515]. He said the Commonwealth claimed Vanzetti had later changed various of his statements because he knew it could be proven his original ones were untrue [3516]. He added that on cross-examination Vanzetti "could find no logical connection between radicalism and the falsehood" he had told regarding the price of the gun. It should be noted that Vanzetti never fully admitted he had told this falsehood and was not really asked the question Judge Thayer paraphrased. Vanzetti had admitted only that there was no connection between the falsehood and literature. [1750-1751]

On appeal this decision was sustained on the ground that the judge was not bound to follow the defendants' experts even though not opposed by counter affidavits. [4352]

The Supreme Judicial Court had said there was evidence that Berardelli had had a 38 H. & R. revolver on the Saturday before the murder and that it was found later in Vanzetti's possession [4315]. The statement is an extension of Bostock's testimony, since he said only that he had seen a revolver similar to Exhibit 27 and that he had been unable to tell its make [197]. This discrepancy was called to the Court's attention on application for a rehearing [4359a]. Judge Thayer made substantially the same error later in his opinion denying the Medeiros motion on October 23d, 1926 [4764]. He argued that the jury, under the decision of the Supreme Court, had had a right to say Vanzetti's revolver was Berardelli's. [4765]

Before the Lowell Committee the only discussion of this subject came from LINCOLN WADSWORTH, one of the Iver Johnson employees. Wadsworth had since the trial obtained the impression he had identified Vanzetti's pistol as the one brought in for repairs and the belief disturbed his conscience:

"But what disturbed my conscience was this thing later that developed. I was under the impression, from hearsay and reports, that I had testified or had given the impression that this pistol in court was the pistol that came into our shop. I had nothing to do with the repairing of the pistol, but I had charge of all the records and handled them at that time, coming in, but I had nothing to with their going out,—with the records going out. And

I heard from several different sources that that testimony was quite important. Of course, a lot of this is hearsay.

(By Mr. Thompson) You can go ahead and give the hearsay and everything else.—But I have felt that I had created the impression that there was a possibility that that was the pistol. Well, that is just a possibility. There are a number of possibilities, and that is a possibility. There is just the one possibility in the number of pistols a factory of that kind happens to make. There was no distinguishing number so that you could tell that that was the pistol. Of course, every revolver has a serial number, but there was no record of this serial number in court. There was nobody had the number in their possession; nobody knew it, and for that reason that pistol had just a very slim chance that that is the one. That is all I can think of on that.

Did you make an effort to say something more?—Yes, before I went into the court room at all,—I don't know whether it was the first or the second interview that I had, it is so long ago my memory fails me on that,—I tried to say that there was, just the same way I do now, that there was just a very slim possibility. But the attorney was insistent there, and he seemed—

You will have to speak a little louder.—Mr. Williams did not seem to want to have that at all, so that I just let be on it. And then in the court room I felt sure I would have a chance to say the same thing that I have said here, but when the time came to be cross-examined I simply was not, that was all, and I went down on the records, as I thought, and still think, that while not a direct statement that that was the pistol, it might lead to the impression that it was the pistol. In fact, it was brought to my notice later that it had very strongly, by a number of people. That was what bothered me.

What is your belief today, judging from your records and all that you have personal knowledge of, what is your belief as to whether that was or was not Berardelli's pistol?—Well, there are thousands of times more chances that it was not than that it was, because there is only one, and just that one pistol, and there are just as many other chances as they had made pistols before that time—I don't know how long they have been in business, but probably thirty or forty years—that it was not." [5235]

Wadsworth described the revolver as very common and cheap. He said that the number of Berardelli's revolver had not been taken by Iver Johnson [5236]. He concluded as follows:

"As I understand it, what you are here for today is to say that from your knowledge of the practice, habits, bookkeeping, and so forth, of the Iver-Johnson Company, there was not any reason, from those records or from any testimony given about them, yours included, that would lead you to believe that was Berardelli's pistol?—That is right.

MR. THOMPSON. That is all.

MR. RANNEY. That is all, I may say at this time that I do not think

that Mr. Wadsworth's testimony, taken at its greatest value, would in any way indicate that he tried to identify the revolver shown him at the trial as the one which he received for repairs from Berardelli. He merely testified, as I understand it, to the fact that a gun had been received from Berardelli, and that is all." [5238]

The Lowell Committee in its report said:

"Then there is the fact that a pistol that Berardelli had been in the habit of carrying, and which there is no sufficient reason to suppose was not in his possession at the time of the murder, disappeared and a pistol of the same kind was found in the possession of Vanzetti when he and Sacco were arrested together, and of which no satisfactory explanation is given. It is difficult to suppose that Berardelli was not carrying his pistol at the time he was guarding the paymaster with the pay-roll, and no pistol was found upon his person after his death. It is natural also, if the bandits saw his pistol they should carry it off for fear of someone shooting at them as they escaped." [5378w]

The Committee considered significant the fact that no extra cartridges were found on Vanzetti [5378y]. Their absence is consistent with the theory that the gun was Berardelli's, but it is equally consistent with Vanzetti's explanation that he had bought a loaded gun at second hand.

The Committee's observation that it was natural for the bandits to carry off Berardelli's pistol can readily be accepted, especially if the pistol fell out of Berardelli's clothes or from his hands, even though no eyewitness observed anything of the sort. The conclusion that Sacco gave this pistol to his friend Vanzetti does not seem quite so natural. The possessor of Berardelli's pistol would be obviously marked as a murderer. It would seem more natural for a bandit who may have picked up this pistol to have thrown it away, as the containers of the payroll were thrown away.

In conclusion it may be said that there is no doubt Berardelli's gun and Vanzetti's were similar and that the question of their identity seems to rest entirely on whether or not the hammer had been repaired in both. In this connection, it is pertinent that Mrs. Berardelli thought what her husband's gun needed was a new spring, that the repair clerk at Iver Johnson's did not know what was the calibre of the gun he repaired, and that his records show a 32, whereas Vanzetti's gun was a 38. No expert testimony was ever offered by the prosecution on the subject of the hammer in Vanzetti's gun, but both defense experts at the trial testified it was not a new hammer and Hamilton later agreed with their opinion, although he had a reason other than theirs for his own. There remains Fitzmeyer's testimony to the effect that he thought it a new hammer because the firing-pin showed no powder marks. This witness was not cross-examined on the point, but his testimony is hardly credible in view of the failure of the prosecution to support it by the testimony of the experts. Both Mr. Katzmman and Judge Thayer referred to Fitzmeyer's testimony in such a way as to give the jury the impression he had testified to having himself put a new hammer into Vanzetti's gun. He had not so testified.

On the other side is the testimony of a number of witnesses identifying Vanzetti's gun and tracing its history. The basis of their identification is very uncertain. It can hardly be disputed, however, that there was a similar gun sold by Slater to Orciani and, if Falzini was to be believed, this was Vanzetti's. While Falzini was mistaken as to the number of chambers in the weapon and uncertain about some of its identifying marks there was no inherent improbability in his story.

V

CONSCIOUSNESS OF GUILT AND THE ISSUE OF RADICALISM

- a. The Testimony at the Trial.
 1. The Events at the Johnson House.
 2. The Actions of Defendants upon Arrest.
 3. Armed Condition of Defendants.
 4. Misstatements by Defendants after Arrest—The Explanation of Radicalism.
- b. The Summations and the Charge.
- c. Subsequent Discussion.
- d. Before the Lowell Committee.
- e. Summary.

JUDGE THAYER, in an opinion written in 1924, said that the verdict in this case did not rest on the testimony of eyewitnesses but on evidence of "consciousness of guilt" [3514]. He cited as such evidence various falsehoods told by the defendants, as well as the attempt attributed to them by the police to use their guns on arrest. [3516-3524]

At Vanzetti's trial for the Bridgewater hold-up the prosecution had claimed that some of his actions and statements showed consciousness of guilt, and had relied particularly on his denial to Stewart of acquaintance with Boda and on the events which took place at the Johnson house just before the arrest. In the opening address to the jury at the trial of both men for murder, however, Mr. Williams, Assistant District Attorney, did not refer to the facts Judge Thayer had cited nor to the contention, later made, that these evidenced consciousness of guilt. He mentioned the occurrences at the Johnson house but drew no inferences from them. Counsel for the defense were probably aware that the prosecution would make the same claim regarding consciousness of guilt as they had made at the earlier trial, even though the phrase itself does not appear in the case until the time when Vanzetti took the stand in his own behalf.

Most of the facts which the prosecution used were developed at the trial before either of the defendants took the stand but some of the events which resulted in the arrest of Sacco and Vanzetti were not made fully clear to the jury. Indeed, even before the Lowell Committee, Mr. Katzmann did not indicate precisely why the authorities had been anxious to find Boda and his car. That the latter owned an Overland and that two days after the Braintree crimes he had taken it to Johnson's garage in West Bridgewater for repairs was learned by the police. Boda had lived for a time about three

quarters of a mile from this garage, in the shack of a man named Coacci. The shack was approximately two and a half miles from the Manley woods, in which was discovered, on April 17th, 1920, the Buick car later identified at the trial as that in which the bandits had escaped. Coacci, under orders of deportation, surrendered to Chief Stewart of the local police just after the Braintree crimes and seemed anxious to be deported. The next day Stewart interviewed Boda at the shack but did not arrest him. It may be that his ownership of a car had not then become known. Immediately after the interview with Stewart, the nature of which has never been disclosed, Boda seems to have left. As it was generally believed the Braintree crimes were the work of Italians, the police were at this time looking for all Italians who operated cars. Therefore, they wanted to question Boda again, especially since there were reports (not later supported by evidence), that Boda had been seen driving a Buick car similar to the one used by the bandits. The police arranged with the garage owner, Johnson, that he should notify them when the man came for his machine.

Boda was an acquaintance of Sacco and Vanzetti. Early in May, as a result of Vanzetti's trip to New York, the defendants, according to their testimony, wanted the use of an automobile to gather the radical literature belonging to their friends and hide it in anticipation of new raids against radicals. Orciani, a mutual friend, arranged with Boda for the use of his car. On the night of May 5th, Boda went to Johnson's garage with Orciani, on the latter's motorcycle. Finding the garage closed, they proceeded to the Johnson home on Elm Street in West Bridgewater, a few hundred yards from the garage. Here Sacco and Vanzetti, who had come from Sacco's house by trolley, joined them. Boda rang the bell. Greeted by Mrs. Johnson, he asked for her husband, talked with him and then went off with Orciani, without taking his car with him. Mrs. Johnson walked to a neighbor's house, where she telephoned the police. She claimed that on her way Sacco and Vanzetti followed her. The prosecution argued that the four Italians became alarmed when they observed Mrs. Johnson going into a house from which telephone wires were visibly strung and that they all went away immediately rather than run the risk of waiting for Johnson to get out the car. Sacco and Vanzetti denied having paid any attention to Mrs. Johnson's actions and claimed that Boda did not take his car away, because, since he had no license plates for 1920, Johnson had advised against his doing so. This version was partly confirmed by Johnson. Neither Boda nor Orciani ever gave any testimony. The former fled to Italy; the latter assisted the defense during the trial but did not appear during any of the later proceedings.

After leaving the Johnson house Sacco and Vanzetti walked off in the direction of Brockton and boarded an approaching trolley car with the intention of returning to Sacco's home. They were arrested by one of the police officers sent out in response to Mrs. Johnson's telephone message. This officer, Connolly, claimed that in the trolley car and also later, in an automobile on the way to the police station, the defendants had made at-

tempts to use the loaded weapons they were carrying. The District Attorney argued that such conduct was inconsistent with innocence of serious crime. The defendants both denied the suspicious acts attributed to them by Connolly.

On the night of their arrest Chief Stewart questioned both men about the reason for their presence in West Bridgewater, about their radical beliefs, about their acquaintance with Boda and others, but not about either the Braintree or the Bridgewater crimes. Both Sacco and Vanzetti gave false reasons for their presence in the neighborhood and denied knowing their friends; Vanzetti partially admitted his radical views, but Sacco denied that he was an anarchist or a communist. On the next day District Attorney Katzmman examined them at greater length, questioning them about their movements during the preceding weeks and the purchase of the guns and ammunition they had been carrying. He also asked Sacco several things about the Braintree crimes, the answers to some of which Sacco later admitted as false. The prosecution argued that the defendants told these lies so as to divert suspicion from their complicity in the crimes. At the trial Sacco and Vanzetti admitted that they had lied but did not acknowledge all the statements imputed to them. They also admitted guilty consciousness, but not in respect to the murders. Their claim was, that they had been in fear both of deportation as radicals and of possible violence to their persons during detention, since they had vividly in mind the fate of Salsedo, whose death while held confined by Federal agents in New York had been reported in the press only two days before their own arrest.

This claim of the defendants was not advanced by counsel in their opening address to the jury. The defense was in that opening described as consisting of two parts—denial by eyewitnesses that either defendant was one of the bandits, and evidence of alibis. No attempt was made to explain any of those acts or statements of either defendant which the prosecution, as must have been known to counsel, was going to claim showed consciousness of guilt. Counsel realized, nevertheless, the seriousness of the inferences which might be drawn against the defendants if the evidence, especially that consisting of their falsehoods, were to remain unexplained. Although the statements made to Mr. Katzmman were not before the jury as part of the prosecution's case, it was evident they would be used on cross-examination. Not to call the defendants at all would have been fatal to their case. To call them, required divulgence of their radical beliefs as explanatory of the lies they had told and of any suspicious conduct at the Johnson house. Before reaching a decision on this subject counsel for the defendants, at the suggestion of Judge Thayer, conferred with Mr. John W. McAnarney, brother of Vanzetti's attorneys, himself a trial lawyer of repute. As Mr. McAnarney later told the Lowell Committee, the lawyers reached the conclusion that not to call the defendants was out of the question, to call them without disclosing their radical views, impossible; and that therefore the risk of these views prejudicing the jury had, finally, to be taken. Thus the radical beliefs and activities of Sacco and Vanzetti came into the case chiefly

as an explanation for the lies they told after their arrest.

Mr. Katzmann cross-examined Sacco at great length about these radical views. At one time the cross-examination was defended as being a test of the defendant's credibility, that is, an attempt to find out whether he really was a radical; at another time it was supported as part of an effort to show that no logical connection existed between the lies and the proffered explanation of them. In his summation Mr. Katzmann even charged that the whole defense of radicalism had been made up during the trial in order to meet the exigencies of the case, pointing in support of this argument to the failure of defendants' counsel to mention this defense in their opening. After the trial the defense claimed that Katzmann's cross-examination of Sacco had been deliberately designed to prejudice the jury, since the District Attorney had known all along that Sacco was a radical. The contention was discussed on the appeal, in the Medeiros motion for a new trial and also before the Lowell Committee. At the Lowell hearings Mr. Katzmann admitted having known of Sacco's radicalism before the cross-examination.

At the trial Judge Thayer charged the jury that they should take none of the matters relied on by the prosecution into account unless they believed that the defendants were motivated by desire to escape detection for the murders. If their acts or statements were due to fear of deportation, or any other reason not related to the murders, then, he said, the jury could not consider any of this evidence against them. No exception was taken by counsel to this charge at the trial, nor has it been criticized since. It was a fair and thorough statement of the law applicable to the circumstances.

Judge Thayer reviewed the evidence bearing on consciousness of guilt in several of his opinions. It was never discussed by the Supreme Judicial Court, although that court upheld the cross-examination of Sacco as a proper test of his credibility. The Lowell Committee considered the whole matter in its report, as did Governor Fuller. The evidence at the trial and the subsequent proceedings will now be analyzed in detail.

a. The Testimony at the Trial

This testimony falls under four heads: (1) the events at the Johnson house; (2) the actions of the defendants upon arrest; (3) the armed condition of defendants; (4) the misstatements made by the defendants after arrest.

1. The Events at the Johnson House

MRS. RUTH JOHNSON testified that after her husband had gone to bed on the night of May 5th, she was called to the door of her home in West Bridgewater by a man who turned out to be Boda; and that subsequently, as the result of a talk with her husband, she went to a neighbor's home, the Bartlett house. As to what occurred after she left her own house she testified as follows:

—"Well, I stepped out of the door, and I started towards Brockton. These

two men seemed to come right along with me, only on the other side of the street. I was on the left-hand side, and they were on the right-hand side. Then I went over to the next house.

Well, did you see anything before you got over to the next house?—Yes.

Just tell us what you saw?—There was bright light shining on to the bridge.

As you came out of the door of your house, did you see anything more than you have already told us?—I saw the bright light, that is all.

Just tell us about that, where it came from and what it was?—I saw a light shining, and there isn't any light near my house at all.

You mean, no light?—No light.

No street light?—No street light. I wondered where the light could come from, and I glanced towards Brockton and I saw a large light shining towards me, and I couldn't see what was behind it." [677]

The witness discovered that the light came from a motorcycle which she passed on her way to the house, where she telephoned. She was not permitted on the witness stand to state the nature of her call. She said that while she was talking the men were right opposite the house but not within hearing distance [679]. When she came out ten minutes later she saw the same men as before, she said, and they seemed again to be walking along with her. She noticed that the motorcycle had turned its light towards Brockton and was now shining in her face. The men, she said, stayed by the motorcycle when they reached it [681]. She had not heard them say anything to each other [684]. She added that later, at the police station she saw one of them again and that he was Sacco. [682]

Mrs. Johnson was cross-examined with particular emphasis upon whether or not she was sure the men she saw when she came out of Bartlett's were the same she had seen before.

"You don't know and have no idea whether those are the two men that were walking when you went into Mrs. Bartlett's?

MR. KATZMANN. One moment, if your Honor please.

You have no idea, have you, that those were the two men that were walking on the street when you went into the Bartlett house?

MR. KATZMANN. One moment.

THE COURT. Have you any idea whether those were the same men or not?—One of them.

Are you sure?—I am sure." [693]

She was asked about testimony she had given at another time, the time of the trial of Vanzetti at Plymouth:

"Q. Of course, at the time you did not know who they were or whether they were the same men or not? A. No.'

Do you now say you did not so answer?—Probably I answered that.

And if you so answered at that time, you meant to tell the truth, didn't you?—Yes.

As a matter of fact, Mrs. Johnson, having in mind the true situation that

night, to wit, a dark night, men who were entire strangers to you, and the only view that you got of the faces of those men was practically when the searchlight of an automobile flashed or was on one of the [694] men, are you prepared to say that you can definitely identify any one of those men?—Yes.

Notwithstanding the fact that you now say it was true when you testified to it that you don't know whether the men who walked up the street are the same men that you saw ten minutes later?—One of them.

Did you not say there that you couldn't tell whether or not they were the same men?

MR. KATZMANN. One moment, if your Honor please. That is not the question.

MR. MCANARNEY. I submit it is the question.

THE COURT. I will allow the question. Of course, it is for the jury to interpret that meaning, whether she had in mind both or one. It is for their interpretation, not for me.

MR. MCANARNEY. I submit that when the question is 'men,' that there can be only one interpretation,—and it requires no interpretation.

THE COURT. That is for the jury. The district attorney evidently was going to contend differently, and I am going to leave it for the jury to determine just what the language was.

MR. MCANARNEY. I am not going to have any misunderstanding on that. That there be no misunderstanding, or any occasion to misunderstand, I now repeat that question:

'Q. Of course, at the time you did not know who they were or whether they were the men or not'—

MR. KATZMANN. 'The same men.'

MR. MCANARNEY. —'the same men or not? A. No.'

You knew that question meant 'men,' that 'they' meant men, didn't you?—Yes.

No misunderstanding about that, is there?—No.

MR. MCANARNEY. Again, on the same line. '11' on the left margin of the record, Mr. Katzmann. (Reads.)

'Q. Now, were they the same two men who followed you as you went from your house to Bartlett's? A. I don't know; I would not say for sure. They looked like them, in the glance I took when I came out of the house.

Q. When you came out of the house, did you get a good look at them before you went to the Bartlett house? A. Well, I could just see he had a derby and a long coat and his face looked dark, and I don't think I would recognize him if I had not seen him.' . . . [695]

Now, in view of your question and answer as I have read to you wherein you answered No, do you now want to say that you recognized Sacco before you went into the Bartlett house?—I would know him if I saw him again.

Pardon me, will you answer the question?—Please read the question.

MR. KATZMANN. I ask that that answer stand, if your Honor please.

MR. MCANARNEY. I submit it is not an answer to the question.

THE COURT. Can you answer it, Mrs. Johnson, by Yes or No.

THE WITNESS. Yes.

Then by that I assume that you mean you did recognize him before you went into the Bartlett house?—Before I did, yes.

Before you went into the Bartlett house?—Yes." [697]

SACCO, on cross-examination, denied that he had followed Mrs. Johnson [1908]. VANZETTI was not asked anything about this. He was, however, cross-examined about the questioning of Mrs. Johnson:

"I mean on that particular point, whether either Mr. or Mrs. Johnson saw you the night you were arrested down near their house? [1756] Didn't your lawyer spend a long time on that?—My lawyer spent time on that, yes.

And a long time, wasn't it?—I don't remember exactly. I don't care if it is long or not. I think that is a matter of my lawyer, not a matter of me.

All right. I don't mean to suggest—

MR. JEREMIAH MCANARNEY. Pretty good answer." [1757]

In part, Mrs. Johnson's testimony was contradicted by her husband, SIMON E. JOHNSON. He said on cross-examination that, during all the time he watched, the motorcycle's light had faced towards Brockton, and that the two men had at no time come within its radius [718]. Johnson, however, had not seen his wife until she was on the way back from the Bartlett house, when the three men were already back beside the motorcycle. [711-712]

On cross-examination Johnson said Boda had accepted the advice he gave that he leave the car because it had no license plates for 1920:

"Now, Boda came there to get his car, didn't he?—Yes.

There were no 1920 number plates on it?—No.

You advised him not to take the car and run it without the 1920 plates, didn't you?—Yes.

And he accepted your view?—He seemed to.

He seemed to. And after some conversation went away?—Yes." [715]

Johnson was later recalled and gave a somewhat different flavor to this conversation with Boda, saying:

"—He said he came for his car, and I asked him if he had any number plates. He said 'No.' 'Why,' I said, 'You can't take it without number plates.' 'Well,' he said, 'I will take the chance.' And I said, 'All right. As soon as my wife gets back I will go down with you,' and then when my wife came back from the Bartlett house, he said, 'Never mind, it is too late. I will send somebody for it to-morrow.' That was practically all of it.

Was anybody sent for it the next day?—No." [876]

Johnson stated on this second occasion that the telephone wires going to the Bartlett house were visible to Boda from the street. [877]

Some attempt was made on cross-examination to show that the last

version of Johnson's conversation with Boda was different from versions the witness had given other people, but the questions asked were inept and the record was left in confusion. [879]

It was undisputed that after the conversation the four men had left, Boda and Orciani on the motorcycle, the defendants on foot.

2. The Actions of the Defendants upon Arrest

Sacco and Vanzetti were arrested a short time after they left the Johnson house on a street car going towards Brockton. Michael J. Connolly boarded the car first and was followed shortly afterwards by Officer Earl J. Vaughn.

CONNOLLY testified he had been looking for two foreigners regarding whom a telephone message had come through to the effect that they had tried to take an automobile in Bridgewater [751]. He said he saw the defendants in the car and arrested them:

"—I went down through the car and when I got opposite to the seat I stopped and I asked them where they came from [751]. They said 'Bridgewater.' I said, 'What was you doing in Bridgewater?' They said, 'We went down to see a friend of mine.' I said, 'Who is your friend?' He said, 'A man by the—they call him "Poppy."' 'Well,' I said, 'I want you, you are under arrest.' Vanzetti was sitting on the inside of the seat.

When you say 'on the inside,' you mean toward the aisle or toward the window?—Toward the window. The inside of the car; and he went, put his hand in his hip pocket and I says, 'Keep your hands out on your lap, or you will be sorry.'

THE DEFENDANT VANZETTI. You are a liar!

THE WITNESS. They wanted to know what they were arrested for. I says, 'Suspicious characters.' We went,—oh, it was maybe about three minutes' ride where the automobile met the car coming from the central station. Officer Vaughn got on just before, and when he got on I told him to stand up, and I told Officer Vaughn to fish Vanzetti; and I just gave Sacco a slight going over, just felt him over, did not go into his pockets, and we led them out the front way of the car.

Now, just a minute, please. Was anything found on either man at that time?—There was a revolver found on Vanzetti." [752]

Shortly after Vaughn boarded the car a police automobile came along into which the defendants were transferred. Connolly said:

"—I put Sacco and Vanzetti in the back seat of our light machine, and Officer Snow got in the back seat with them. I took the front seat with the driver, facing Sacco and Vanzetti.

What do you mean? You say you were in the front seat with the driver?—Yes, I turned around and faced Sacco and Vanzetti.

All right.—I told them when we started that the first false move I would put a bullet in them. On the way up to the station Sacco reached his hand to put under his overcoat and I told him to keep his hands outside of his

clothes and on his lap. [752]

Will you illustrate to the jury how he placed his hand?—He was sitting down with his hands that way [indicating], and he moved his hand up to put it under his overcoat.

At what point?—Just about the stomach there, across his waistband, and I says to him, 'Have you got a gun there?' He says, 'No.' He says, 'I ain't got no gun.' 'Well,' I says, 'keep your hands outside of your clothes.' We went along a little further and he done the same thing. I gets up on my knees on the front seat and I reaches over and I puts my hand under his coat but I did not see any gun. 'Now,' I says, 'Mister, if you put your hand in there again you are going to get into trouble.' He says, 'I don't want no trouble.' We reached the station, brought them up to the office, searched them." [753]

No testimony in regard to suspicious acts on the part of either defendant had been given by Connolly at the trial of Vanzetti for the Bridgewater crime [See 144*–149*]. This difference in his testimony seems, however, never to have been pointed out by the defense at any stage of the proceedings in the Braintree case.

VAUGHN testified that when he reached the car Connolly had already arrested the defendants [749]. He took a gun from Vanzetti, he said, and then left him and Sacco with the other officers and did not go along with them in the automobile. [750]

MERLE A. SPEAR, police officer who drove the car, testified he had heard Officer Snow, who was with him, tell Sacco to keep his hands where he could see them and Sacco's answer: "You need not be afraid of me." Spear did not see the defendants do anything [780]. Snow did not testify at the trial.

Both defendants denied having attempted to draw their guns [1724, 1821]. Vanzetti also testified that Connolly pointed a revolver at him when he arrested him saying: "You don't move you dirty thing." [1724]

3. *The Armed Condition of Defendants*

When arrested both defendants were armed. Sacco had, loose in his pockets, twenty-three extra cartridges for his pistol; Vanzetti had no extra cartridges, but he did have a number of shotgun shells.

VANZETTI testified that these shells had been given to him by Mrs. Sacco on the afternoon of May 5th; also that he took them to give to friends in Plymouth who hunted:

"Did you see Mrs. Sacco doing anything?—Oh, yes, Mrs. Sacco was preparing the stuff, clothes and everything like that for to be ready to go away.

I don't know that they can hear you. I am getting close to you. What was she doing?—She was preparing the stuff for the trip.

For what trip?—To put in order to go to Italy.

What did you see her doing?—I saw her put the stuff in the trunk from the commode.

Did any one there give you anything?—Yes, before we go away I take the three gun shells. [1714] . . .

Three. How come you to get those? Where were they got?—They got in top of the stage in the kitchen.

On the side of the kitchen?—You know in the kitchen there was a piece of wood like this [indicating].

A shelf, we will call it?—Yes, and it was on top of there.

How come she to give them to you? How come you to get them?—Because I say, 'I will bring to my friends in Plymouth.' My friends, I know they go to hunt in the winter time.

Go to shoot in the winter time?—Yes.

What did you do with those shells?—I put in my pocket. I want to give to him when I reach Plymouth." [1715]

On cross-examination he was not sure whether he had received three shells or four shells [1748]; or whether it was Mrs. Sacco or Mr. Sacco who had given them to him. [1773]

Sacco said that the shells were all that were left of some which had been used some years before by a friend [1863]. On cross examination he thought that the friend had used them to shoot at birds or rabbits [1894]. He did not know whether Vanzetti intended to go bird hunting with them. [1895]

Mrs. Sacco testified that she had come across the shells in cleaning up and that Vanzetti had taken them, saying that a friend of his would probably give him fifty cents "for propaganda" [2058].

There was no evidence that Vanzetti had ever owned or used a shotgun. Some kind of rifle had been found by Connolly in Sacco's house after his arrest [880], but it was not produced at the trial and Mr. Katzmman consented that the jury disregard evidence about it. [940]

The circumstances of Vanzetti's ownership of his revolver have been discussed in the preceding chapter (pages 390 to 393).

Sacco testified that he had owned his pistol for many years. He said he had picked it up, and the extra bullets too, on the afternoon of the day on which he was arrested, when his wife came across the articles in the cleaning she was doing preparatory to their departure for Italy. It had been his intention, he said, to fire off the cartridges in the woods, but he had become engrossed in an argument with his friends and had forgotten to do so:

"Mr. Sacco, how did it happen that you were carrying on the evening of May 5th a revolver or a pistol?—Well, to use like that. My wife used to clean the house, get ready, because we are to go Saturday to New York to get the steamboat, and she was getting ready, and so she cleaned the bureau, and because the revolver, the pistol and bullets——

Start again. Repeat that entire answer loud and full.—May 5th, always to start from May 2nd. My wife started to prepare something, the clothes,

you know, to get ready, so May 5th she cleaned the bureau, and the pistol was closed with a key, because I was afraid that sometime my boy could go after it, so she cleaned the bureau and she pulled out the bullets and the pistol, and then she ask me, she said, 'What are you going to do, Nick, with this?'

MR. KATZMANN. One moment.

Not what she said to you, but what you did.—So I took that sometime in the afternoon, about half past three, I should say, about four o'clock anyway. I said, 'Well, I go to shoot in the woods, me and Vanzetti.' So I did. I took it in my pocket. I put the revolver over here (indicating) and the bullets in my pocket, in my pocket back. Well, we started to talk in the afternoon, me and Vanzetti, and half past four Orciani and Boda came over to the house, so we started an argument and I forgot about to go in the woods shooting, so it was still left in my pocket." [1858]

On cross-examination he explained he sometimes carried the gun when he went to buy groceries in Boston, and said:

"Wasn't it a pretty unusual thing for you to carry the gun?—Well, it is, but men have to defend themselves. In the country you don't know what you need.

What did you carry the gun there for?—Well, I carry that because I don't think they could not find. Any man could get one year's imprisonment. By walking they could find very easy by the pocket, in my back pocket, I suppose.

Twenty years in prison?—One year.

Is that why you carried it there?—Yes.

Did the fact you could whip it out quick have anything to do with it?—No.

That wasn't the reason?—No.

Now, will you let me have it?—Sure.

Were those cartridges of perceptible weight in your pocket, the extra ones, when you went away that night?—Yes.

Are you telling this jury that you were not aware of the fact when you left your house on May 5th that you had this gun tucked in here? Are you telling them that?—Yes.

Did not perceive the weight of it?—No, sir." [1903]

MRS. SACCO confirmed her husband's testimony about the pistol and bullets. [2058–2059]

That Sacco had owned a pistol during the time he was acting as night watchman at the 3-K Shoe Factory was testified to by the owner and by his son, the superintendent. MICHAEL F. KELLEY, the owner, said he had warned Sacco of the necessity for obtaining a license to carry the pistol [1608, 1610]. GEORGE T. KELLEY, the superintendent, said he did not know whether Sacco had used the gun while "doing his duty" as night watchman [865, 866]. Neither father nor son had actually seen the pistol, having merely been told by Sacco that he had one.

4. *Misstatements by Defendants after Arrest—The Explanation of Radicalism.*

On the night of the arrest, at about eleven o'clock, Sacco and Vanzetti were questioned by MICHAEL E. STEWART, Chief of Police of Bridgewater [840]. At the trial certain of the questions Stewart then put were read to the jury but those relating to the men's opinions were omitted. After the defendants had testified some of these omitted questions were read. [2110]

None of Stewart's questions related to either the Bridgewater crime or that at South Braintree, nor had they any reference to the dates on which these crimes had been committed.

According to Stewart both defendants told substantially the same story about having gone to West Bridgewater to see a man named Poppy and both denied knowledge of a motorcycle, of Boda, and of various other persons. Both gave their correct names and addresses [842-848]. They differed as to the time they had left Sacco's house to go to the Johnson garage, Vanzetti saying it was 3:30 [844] and Sacco, 6:30 [847]. Sacco stated that he had bought the gun in his possession when arrested long before, in Boston, near Hanover Street. [849]

On the day after their arrest both defendants were interviewed by the District Attorney. Although the statements they made were not read to the jury as part of the prosecution's case, that they would be used in the cross-examination must have been expected by their counsel. Sacco and Vanzetti, in other words, had to be prepared to meet the claim that their acts at the Johnson house, their movements at the time of arrest and their statements to both Stewart and Katzmann indicated guilty consciousness of murder. It was in order to do so that they recounted their radical connections, their concern over the fate of Salsedo, and their own fears.

VANZETTI, on direct-examination, said that on the way to the Johnson house he had prepared a notice¹ for a meeting to be held on behalf of Salsedo and Elia in Brockton on Sunday, the 9th, and that he had given this notice to Sacco, who had intended to have it printed [1717-1718]. He recounted how he and Sacco had walked toward Brockton from Elm Square, had seen the motorcycle and, after a little while, had noticed a woman coming towards them [1720]. He went on to testify that Boda had told the others he could not take out the car because it had no number plates. It had been planned, he said, to use the car in taking literature from the homes of people whom they knew:

"What house and homes did you want to take the books and literature from?—From any house and from any house in five or six places, five or six towns. Three, five or six people have plenty of literature, and we want, we intend to take that out and put that in the proper place.

What do you mean by a 'proper place'?—By a proper place I mean in a

¹ Quoted on page 12.

place not subject to policemen go in and call for, see the literature, see the papers, see the books, as in that time they went through in the house of many men who were active in the Radical movement and [1721] Socialist and labor movement, and go there and take letters and take books and take newspapers, and put men in jail and deported many.

MR. KATZMANN. I ask it be stricken out.

THE WITNESS. I say that in that time——

MR. KATZMANN. Wait one moment.

THE WITNESS. And deported many, many, many have been misused in jail, and so on.

Where were you going that night if you could have got the automobile?—I intended to go to Plymouth and speak to some of my friends of Plymouth who is owner of the house.

And do what?—And if they are willing to receive such literature and newspapers in his house.

Now, where were you going to take these papers and literature you were going to take from these houses? What were you going to do with them? Suppose you had got the automobile that night and you had gone down to Plymouth to these houses? What were you going to do with the papers you would pick up here?—Before to pick the paper, I want to find the place and ask if my friend in Plymouth, if he was willing that we bring the paper in his house." [1722]

Vanzetti testified that he had not been told for what offense he was under arrest, and that after his arrest he had been threatened by a policeman:

"What did they say what you were arrested for?—They say 'Oh, you know, you know why.' And when I try to sleep in the cell, there is no blanket, only the wood. Then we called for the blanket, because it was rather cool. They say, 'Never mind, you catch warm by and by, and to-morrow morning we put you in a line in the hall between the chairs and we shoot you.'

MR. KATZMANN. Shoot?

THE WITNESS. Yes.

THE COURT. Get shot?

THE WITNESS. Yes. And one policeman, he started in the same night to walk toward me, and he started to spit toward my face and walk toward my cell, and I was there, stood in back of the door; the door, as you know, the jail door is barred. Then he spit three or four times, and come all the time more near, and I stand more near the bars. I will see if that gentleman is so generous to spit in my face, but he spit. When he reach my face, he spit. Then he go back and took a revolver from his pocket, put out the bullet of the revolver and show me the bullet and then put the revolver,—put the bullet in the revolver again and put the revolver like that [indicating] on top of the gate and point the revolver toward my cell [1725] near where I stand. He maybe want to look if I go away, if I get scared and go away from the door. And I don't go away. I don't move. That is all, and he don't shoot, anyhow.

When did they tell you, if they did, why you were arrested that night?—Absolutely no, they don't tell me.

Did they tell you the next day?—Neither the next day.

Just when,—did they any time while they had you in detention at the Brockton police station, tell you why you were arrested that night on the electric car?—No." [1726]

Vanzetti explained his failure to tell the authorities about the literature, saying:

"—Because in that time there, there was the deportation and the reaction was more vivid than now and more mad than now.

The action?—The reaction. What you call 'reaction.' It mean the authority of this country and every country in the world was more against the Socialist element in that time than before the war and after the war. There were exceptional times.

MR. KATZMANN. If your Honor please, may I have the stenographer read that last thing?

[The answer is read.]" [1726]

The phrase "conscious guilt" first appeared in the case when used by Mr. J. J. McAnarney in justification of certain questions he was asking Vanzetti about his conversations with Orciani and Sacco on May 5th [1729]. Mr. McAnarney suggested the prosecution might argue that the question of conscious guilt arose in connection with the actions at the Johnson house, and said he believed the defendants' state of mind was relevant to this question [1730, 1735]. While the matter remained still undetermined by the Court Vanzetti testified he had not told Stewart the truth:

"because I am afraid he went in that house of the people that they named and found some literature or some paper and arrested the men . . . because I was scared to give the names and the addresses of my friends as I know that almost all of them have some books and some newspapers in their house by which the authority take a reason for arresting them and deport them." [1731-1732]

The Court finally ruled that what Vanzetti had done as the result of his mental states could be inquired into and that the states themselves could be testified about, but that no conversations of Vanzetti's with other people were admissible unless these were such that they had affected his mental state. Mr. McAnarney did not follow up this suggestion of the Court, and Vanzetti's only further testimony was that Boda came to Sacco's house to get the automobile. [1736]

Vanzetti was cross-examined as follows about his admission that he had run away from the draft in 1917:

"[By Mr. Katzmann.] So you left Plymouth, Mr. Vanzetti, in May, 1917, to dodge the draft, did you?—Yes, sir.

And you stayed away, did you not, until the class in which men of your age came had all been drawn in the draft. Is that true?—Not exactly.

What part of it isn't true?—It isn't true because men of my condition were never compelled to be a soldier.

No men of your condition were compelled to be soldiers?—Yes, sir.

Were you physically unable to be a soldier?—I don't speak of the Physical condition. I speak of the civil condition.

Were you physically sound?—I hope so.

Do you know?—I ought to be.

Did you believe you were?—Yes, sir.

Physically sound as you were, and after you had been in this country since 1908?—Yes, sir.

When this country was at war, you ran away so you would not have to fight as a soldier?—Yes.

Is that true?—It is true.

Did you ever work in Springfield, Massachusetts?—Well, I have worked not really in the town of Springfield, Massachusetts, but in a shanty near Springfield.

In a shanty near Springfield?—Yes, in a shanty, you know, the little house where the Italian work and live like a beast, the Italian workingman in this country.

Where the Italian man lives and works like a beast?—Yes.

That is, they locate near the place where you worked?—Yes.

The 'beast' part of it locates it, does it?—Yes.

Did you think I asked you what kind of a building the Italian workingman lived in?—I don't think, but I told that because—

What did you put it in your answer for?—To give the characteristic of the place, because I can't tell the place of the work, the place where this shanty here, I can't tell the name. It is somewhere near Springfield, Massachusetts, in a little shanty where the Italian live like a beast.

And did you think if you put in your answer that it was a shanty where the Italian lived like a beast then I would know where that shanty was? Did you think that part of your answer would tell me?—No, not exactly.

What did you put it in for, then?—I put it for to tell you if I refused to go to war, I don't refuse because I don't like this country or I don't like the people of this country. I will refuse even if I was in Italy and you tell me it is a long time I am in this country and I tell you that in [1737] this country as long time I am, that I found plenty good people and some bad people, but that I was always working hard as a man can work, and I have always lived very humble, and—" [1738]

On cross-examination Vanzetti was asked about his mental condition at the time Katzmann interviewed him. He said he had been not frightened, but disturbed, and that Katzmann had treated him "as a gentleman ought" [1742]. He also admitted he had known Katzmann was the District Attorney and that he would not have had to talk:

"You were willing, were you not, to answer such questions as I asked you?—I am not willing or unwilling. I was there like a piece of paper in my hand, and the policemen take me out and down as they [1742] liked. I do not know the rule of the jail. I do not know very well the language. I speak a little better now after one year in jail than then. I never was arrested before. I never,—I don't know anything about trials, jails, but I know I read that time that some men were called in jail. I know that, and I don't refuse when the police come to take me and bring to you, to take me and bring to be photographed, and to take me and bring me to be recognized by the people who come there, I don't refuse that because I don't know that I have a right to refuse. You tell me if I don't want to speak you don't compel me to speak." [1743]

He testified that they had not intended getting literature that night but had been going first to find some one who would keep it when they did get it [1744] and that he had expected to go with Boda, first to Bridgewater to find Poppi, and then to Plymouth to find some one who would receive the books:

"Then what was your purpose and three others, or two others besides Boda, in going down to West Bridgewater to get an automobile that was not to be used for that purpose that night?—We want to take the automobile, and then my intention is to take the automobile with Boda, because I do not know how to drive the automobile, to go to Bridgewater and if we will be able to find the party, because I do not remember the address of the party. I do not know exactly where he lived. We will tell to Pappi about telling the Italian people of Bridgewater to come in Brockton next Sunday at the speech, and after I found Pappi, and speak to Pappi, go toward Plymouth and speak with my friends if I can find some friends who want to take the responsibility of receiving such books in their house, in his house.

Couldn't you, Mr. Vanzetti, have done everything that you say you intended to do by starting in Orcciani's motorcycle with the side-car that was at the Sacco house before you ever started to go to West Bridgewater?—I don't understand what you say.

All right. Do you want an interpreter?—No. You can speak.

I will go slow.—Repeat the question, please. [1745] . . .

Will you tell me, Mr. Vanzetti, why you couldn't have done every one of those things by riding in Orcciani's side-car motorcycle that was right at the Sacco house before you ever started for West Bridgewater?—I know.

Why?—Why, because we want the automobile, see, for to go the day after, go around and take the literature. We had the literature not only in Plymouth, too, but in some house, and we have literature in Bridgewater, we have literature in Brockton, we have literature in almost all the towns around this place here.

Couldn't that have been done by Boda who owned the automobile, without your assistance?—Of course.

Couldn't Orcciani, who you now say went from the Sacco house to West

Bridgewater, if he was willing to go on to Plymouth, have taken you in his motorcycle?—Yes, but we want I shall go there in the automobile and have sure all ready the automobile ready for the day after." [1746]

He said Boda could not have done this alone because he did not know the people of Plymouth, and stated he had not then known that Boda lived in West Bridgewater nor where he did live. Asked whether he could not have met Boda in the morning as well as at night he said: "That is not my fault because I don't know where Boda is or Orcciani lives with Boda." [1746]

"Didn't you make the arrangement with Orcciani to have Boda there at Sacco's house?—Not at all.

Weren't you the man who spoke to him at the East Boston hall?—Yes, I say in the Italian Boston hall that it is better to clean up the house of the literature, to clean up the house of the more active friends. We speak about the means, about how to do, and if you remember well, maybe you don't carry it. It is enough—

MR. KATZMANN. I submit his answer is irresponsive and argumentative. I ask it be stricken out.

THE COURT. You can answer that by yes or no, Mr. Vanzetti, if you please.

THE WITNESS. But that is not the intention that he wants.

THE COURT. I do not know about his intention. He asked that question. If you can answer it by yes or no, you should.

THE WITNESS. I don't speak,—I speak in Boston for the purpose of bringing the literature in some sure place, but I never say to go to look for Boda, see. I speak just to take the literature out." [1747]

Vanzetti admitted he had lied to Katzmann at Brockton about the purchase of his gun [1749]. He would neither affirm nor deny having said that it cost \$19., but admitted not only that such was not the truth but also that the price of the gun had nothing to do with the literature [1750]. (There was no evidence offered that such a statement had actually been made.) He finally said: "what I tell you about the revolver has the same report as literature" [1751]. The meaning of this answer was not made clear until Vanzetti later said that, had he told about the gun, he would have had to bring in the name of the man from whom he had bought it—Falzini.¹ [1799]

He admitted also that he had not told Katzmann the truth about the number of times he had slept in Boston and that he had admitted to Katzmann he was not telling the truth and had been ashamed about it:

"And do you remember then my asking you: 'Q. What are you ashamed of? You have not been telling us the truth?' And your answer: 'A. Yes.' Do you remember that?—Well, I remember something like that.

There is one part of that, Mr. Vanzetti, you remember well, isn't there?—Yes, sir. You want me to tell in this court now?

Don't you want me to ask you, sir?—I don't say that. You can ask me very well. That depends on you.

¹ These answers are quoted at pp. 391, 392.

Well, if you put it up to my generosity, Mr. Vanzetti, I won't ask you,—Well,—[rest of witness's reply unintelligible to stenographer].” [1753]

He did not know whether he had told Katzmann at Brockton that he had left Plymouth on the Saturday before the arrest but he stated that such was not the fact, for he had left on Sunday [1754]. (There was no attempt to prove that the testimony at Brockton was to the effect that he had left on Saturday.) Vanzetti admitted having denied knowing Boda [1755] and having lied about not having seen the motorcycle [1757]. He gave as his reason for these falsehoods the fact that he had not wished to mention the names of his friends. [1758, 1762]

“Every time you said it it was untrue, wasn't it?—Yes, even if you ask me one hundred times I answer one hundred times, ‘No,’ because I have some purpose.

You intended to deceive myself and the officers who were present, did you not?—I intend to not mention the name and the house of my friends.

You intended to not mention names or addresses of your friends?—Yes.

Was there a single name or address I asked of you at the time I talked with you except that of Mike Boda and Pappi?—Well,—

Was there another address I asked of you?—No, but if I told you the truth you would have the opportunity to ask me, ‘Who is this friend who got the literature?’ ‘Who is this Mike Boda?’ ‘Where lives Mike Boda?’ ‘Where lives Pappi?’ I cannot tell where Pappi lives at that time, nor Boda.” [1758]

He had mentioned Pappi he said, because among his friends Pappi was the only one who had no literature. [1759]

Vanzetti admitted he could not have told Katzmann where Boda lived and also that he did not believe he had been asked about anyone besides Boda and Pappi [1758, 1759].

“Then why deceiving me would prevent you telling me where Mike Boda lived if you did not know where he lived?—Because if I tell you where Mike Boda live I have to tell you where some other friends live.

You didn't know where Mike Boda lived, did you?—No.

Then how you could deceive me by pretending you did not know Boda?—Because I don't want to say I knew Boda and I know the other man you call me.

Did I ask you about anybody but Boda and Pappi?—But I could know. Pardon me, sir.—If you will ask after some other names.” [1764]

On being asked why they had not hidden Sacco's books he said:

“—Well, we got no means to take out that much.

‘We had no means to take out?’ Didn't you have your hands with you?—Why, yes.

Weren't the woods nearby Sacco's house?—What?

Weren't the woods nearby Sacco's house, trees nearby, woods?—If there is trees?

Yes.—Yes, there is woods near Sacco's house, but we do not want to spoil

the books. We do not want to spoil the books. We want to keep the books.

MR. JEREMIAH MCANARNEY. Will you talk so Mr. Sacco can hear you?

THE WITNESS. Yes.

You have a good strong voice, haven't you, Mr. Vanzetti?—Not very much now. It is more than one year I am in jail.

Was your voice weak the day Michael J. Connolly was on the stand and you called him a liar when he said how you made a move to your hip pocket?

MR. JEREMIAH MCANARNEY. Wait a minute.

I don't speak very high when I called that man a liar.

You did not speak very high?

MR. JEREMIAH MCANARNEY. I submit that is hardly,—I object to the question. His voice was whatever his voice was. My brother is putting this argumentative question to embarrass the witness, not to elicit any information.

THE COURT. I can't say it is for that purpose.

THE WITNESS. I don't speak more high than I speak now when I call that man a liar.

Is that your recollection of the tone of voice you used that day?—Maybe the tone was different, because the sentiment was different." [1767]

Vanzetti admitted having lied to Katzmman about the length of time he had known Sacco and said that this lie had been told to hide the fact that they had gone together to Mexico to avoid registration. [1777]

"What has it to do with your evasion of the draft?—It has to do because me and Nick we go, we go to Mexico together.

Oh, did Sacco go with you, too?—Yes, sir.

For the same purpose, Mr. Vanzetti?—Yes, sir.

And are you the man, Mr. Vanzetti, that on May 9th was going to address a meeting down at Brockton to your fellow citizens, saying: 'You have fought in the wars, and you have worked for capitalists, and tried their ways?' Are you the man, sir, that was going to address the returned soldiers?—Yes, sir.

You were going to advise in a public meeting men who had gone to war? Are you that man?—Yes, sir, I am that man, not the man you want me, but I am that man." [1778]

There was considerable questioning about the details of Vanzetti's movements on the way to the Johnson house. The witness claimed to have told Mr. Katzmman at Brockton that he had stopped at a certain store to buy cigars and a cup of coffee and that Katzmman had asked him whether they had got some booze there.

"And you say you mentioned to me at Brockton that you bought any cigars that night?—It is my opinion and firm conviction that I told you that I bought cigars and I bought, and I drink, a cup of coffee in that house where you ask me if I went there to drink in there, in that cigar store.

So far as you know, Mr. Vanzetti, had I ever seen you before in my life prior to May 6th?—So far as I know, no.

And so far as you know, had you ever seen me prior to that date?—Well,

I don't remember your face when I meet you on the 6th.

And did you have any evidence whatever of liquor in you when you were arrested or when I was talking with you?—Oh, no. I could not have evidence. It is more than ten years I don't drink any.

So there was no liquor about you when I was talking with you, was there?—No liquor about me." [1783]

Vanzetti was not sure that a number of the questions read to him had been asked and denied having given some of the answers [1779–1783]. No attempt was made at the trial to prove that he had given any of those answers about which he was uncertain or which he denied having given, nor was it proved he had not told Katzmänn about having bought cigars and coffee. He was uncertain, furthermore, about his alleged answers to a number of questions about the cartridges in his pistol [1799–1800] and no proof of these answers, either, was attempted.

He said he had not known, when being questioned at Brockton, that he was suspected of the murder of April 15th [1754]; nor did he recall when he had first discovered such to be the case [1769]. He did not remember whether or not he had told Katzmänn he did not know where he had been on the Thursday before Patriots' Day, April 19th [1802]. It was proven at the trial that he actually had given this particular answer. [2117]

On redirect-examination he said that at the time of his arrest he was afraid, "for I know that my friends there in New York have jumped down from the jail in the street and killed himself. The papers say that he jump down but we don't know." [1808]

He testified he had been sent to New York by a committee to look for Salsedo, and that what he had learned there "operated very bad" upon his mind; and this especially when he learned of Salsedo's death. [1809]

"I learned that most probably for the May 1st there will be many arrest of Radicals and I was set wise if I have literature and correspondence, something, papers in the home, to bring away, and to tell my friends to clean [1810] them up the house, because the literature will not be found if the policemen go to the house." [1811]

He said he had expected to use Boda's car for transporting about 400 or 500 pounds of literature [1811]. He had understood he was arrested on a political charge, he said, because he asked whether he was a socialist, an I.W.W., a Communist, a Radical, or "Black hand." [1812]

Vanzetti's connection with Salsedo was testified to by LOUIS QUINTILINO, who was secretary of the Italian Defense Committee. Quintilino had seen Vanzetti in New York on April 27th or 28th, and, after having had a conference with Walter Nelles, an attorney, he had talked to him about radical literature [2048]. Quintilino testified he had told Vanzetti what Nelles had said. [2049]

WALTER NELLES, a New York attorney consulted by Quintilino, testified that, in the week preceding May 3rd, he had advised Quintilino about the

disposition of radical literature [1982]. He had no means of fixing the date more precisely than this. [1983]

FRANK R. LOPEZ, a radical and a member of the Defense Committee, had had a conversation with Vanzetti both before and after the latter's return from New York and had been informed by him of the necessity for disposing of the literature. [2050]

SACCO substantially confirmed Vanzetti's statements about Boda's remarks in regard to leaving the car in the garage, about their having been ignorant of the nature of the charge, about their having thought themselves under arrest for being radicals, and about why they had told certain falsehoods [1840-1846]. Some of this testimony follows:

"THE WITNESS. I don't know myself. I been hear so many times they say, 'You know, you know,' that is all.

Did he indicate at all the character of the crime you were arrested for?—No, sir. . . .

What did you think was the time when the crime that you were [1844] arrested for had been committed?—I never think anything else than Radical.

What?—To the Radical arrest, you know, the way they do in New York, the way they arrest so many people there.

What made you think that?—Because I was not registered, and I was working for the movement for the working class, for the laboring class.

Was there anything Chief Stewart said to you that made you think that?—Yes. He did ask me if I was a Socialist. I did say, 'Yes.'

Did he ask you any other questions?—He asked me why I was in Bridgewater, what for. I say, 'I give him company, Mr. Vanzetti, because he want to see a friend in Bridgewater, some name by Pappi, but I don't know him.'

When he asked you what you were in Bridgewater for, did you give a true reason for being there?—No, sir.

Why not?—Because I was afraid to arrest us, they arrest somebody else of the people, find out after—

MR. KATZMANN. May I have that answer?

[The answer is read.]

THE COURT. Is that a very clear answer, what the witness said?

MR. MOORE. That is really not a clear answer.

THE COURT. I think you should give him an opportunity to explain what he means there.

What did you mean by that last answer of yours, Mr. Sacco?—Well, just this: I know some,—the most of the friends, Socialists, why, they are slackers. They got literature in the house. They got papers and everything,—Socialist movement. That is why I was afraid they would do the same way as in New York and in Chicago." [1845]

He said Vanzetti had told him and others that no one knew why Salsedo and Elia were being held and that it was advisable that they themselves hide their books and literature:

"THE WITNESS. Vanzetti come into the hall. He told us we are to get [1848] ready and advise our friends, any friends who knows a friend as a Socialist and active in the movement of labor, why, they are advised to get the books and literature to put at some place and hide not to find by the police or the state. And another thing he says nobody know why they arrest Salsedo and Elias.

THE COURT. Nobody knows——

THE WITNESS. Why, for what charge they did arrest Salsedo and Elia and Cammiti, and some of the other fellows before. So they say after all over in New York, a spy to find out the Radicals and they find out the same, the money, all the friends that been sending from Massachusetts and all over New England, been sending the money for the defending of Salsedo and Elia,—who is the man receiving it, who is the man responsible for those things, so we decided and Vanzetti decided it was same time, the quicker we come and get literature and anything out of the Radicals' house, the Socialists, and to hide it. That is all he said. That is why I remembered. He probably said some more, but I could not remember all the conversation we had, because he been talking an hour, pretty near hour and a half, and I could not remember all he says." [1849]

The witness referred to various radicals who had been deported. He testified that on May 2nd it had been decided to use an automobile in gathering the literature and that Orciani had said Boda had a car and that he would find out whether he could get the use of it [1850] He testified that he had been under the impression they were going to take some of the books out on the night they went for the car [1847]. The next morning, however, he said:

"Well, if we get the automobile, Vanzetti and Boda will go to Plymouth. Before they go to Plymouth, they are to go and see Pappi in Bridgewater, West Bridgewater,—I do not know where it is—and I will come back with Orciani, with me to Brockton to see the friends, my friends, and try to find out when we can print those handbills, print, have the bills for Sunday, and another thing. I will advise the same thing to my friends to be preparing, letter and paper, everything in a valise, so next day the friends will come around and take the literature and bring it away. Then after I go back to my house,—Orciani bring me to my house." [1857]

When cross-examined about this variation in his testimony he stated there had been no change.

"Do you remember saying yesterday that your real purpose and intent on May 5th was to gather up these publications that night? Do you remember saying that, to gather them up that night in the auto?—If we had the time. . . .

The same night. And didn't you state yesterday, without any reservation, that that is what you went to get the auto for that night?—Yes.

There wasn't any talk yesterday when you were on the stand about Vanzetti and Boda going to Plymouth in the auto, was there, from you?—No, but I know they were going to go.

You knew it yesterday, didn't you?—What?

You knew that yesterday, did you?—No, sir.

When did you learn it?—4th of May.

Then you knew it yesterday, didn't you? Do you get my question?—They asked me, sure.

I want to know if when you were testifying yesterday as to what you four men were going to do that night, to wit, going to collect books and periodicals that night, I want to know if when you said that yesterday you knew that Vanzetti was going to Plymouth with Boda?—Yes, sir.

Why didn't you say so yesterday?—They did not ask me. Did they ask me that?

Weren't you asked what your purpose was that night, by your own counsel?—The counsel, I suppose, did not ask me at all.

You think he did not ask you?—If I was going to Plymouth.

These questions when answering when you said you were going to get the books that night?—I do not remember if I did say or not. [1891] . . .

Did you say you intended to visit friends in Brockton and advise them to put their books and periodicals in valises ready for the next day? Did you say that yesterday?—Yes.

You are sure of that, Mr. Sacco?—Yes, sir, pretty sure.

Are you dead sure of it?—I am pretty sure.

Are you certain of it?—Yes, sir.

Did you come to a realization over night last night that Vanzetti had said you were not going to get books that night and that yesterday you said you were? Did you think that over during the night?—I says if we had the time, if they had that time early.

No, pardon me. Last night when you left this court room, and before you came back this morning, did you realize you had said one thing and in that regard Vanzetti said another? Did you realize that Vanzetti said you were not going to collect that night and that you had said you were going to collect in the auto? Did you think that over last night?

MR. JEREMIAH MCANARNEY. Do you claim Vanzetti said that he, Sacco, was going to collect, or that he, Vanzetti, was? Your question is to him, 'Did you?'

MR. KATZMANN. I claim that Vanzetti said they were not going to collect any books or periodicals that night. This man said yesterday they were.

MR. JEREMIAH MCANARNEY. The question was, did Vanzetti say that you were going to collect? Vanzetti did not say that.

MR. KATZMANN. Vanzetti said yes and this man said yes.

MR. JEREMIAH MCANARNEY. Now, you say 'you.'

THE COURT. Put your question now, please.

Did Vanzetti say the four of you, four of you were not going to collect books May 5th after you got the auto? Did he say that when he was testifying?—Who was going to collect?

Did he say that, the question is, if they were not, if you four were not going to collect books May 5th?—Well, if he had the time, the chance

early to get the automobile to get to Plymouth to find a place where he could put it, why, sure, he would get the books.

Didn't he say that he intended—that he had not—that he was going to make inquiry at Plymouth the next day and that it was not their intention to collect until he found a place to hide the books. Didn't Vanzetti say that?—Probably I mistake or probably Vanzetti is right. [1892]

I am not asking you if you are mistaken. I am asking you if Vanzetti said that, if he said you four were not going to collect, that he had not arranged for a hiding place, that he was going to Plymouth and arrange for it and collect afterwards?—Yes.

And didn't you say that, on the contrary, that if you got the auto that night the four of you were going to collect books that night?—If we have the time, yes." [1893]

Sacco was subjected to an extensive cross-examination about his opinions. For the reason that no summary can give its flavor, it follows in full:

Cross-examination

"[By Mr. Katzmänn.] Did you say yesterday you love a free country?—Yes, sir.

Did you love this country in the month of May, 1917?—I did not say,—I don't want to say I did not love this country.

Did you love this country in the month of 1917?—If you can, Mr. Katzmänn, if you give me that,—I could explain—

Do you understand that question?—Yes.

Then will you please answer it?—I can't answer in one word.

You can't say whether you loved the United States of America one week before the day you enlisted for the first draft?—I can't say in one word, Mr. Katzmänn.

You can't tell this jury whether you loved the country or not?

MR. MOORE. I object to that.

—I could explain that, yes, if I loved—

What?—I could explain that, yes, if I loved, if you give me a chance.

I ask you first to answer that question. Did you love this United States of America in May, 1917?—I can't answer in one word.

Don't you know whether you did or not?

MR. MOORE. I object, your Honor.

THE COURT. What say?

MR. MOORE. I object to the repetition of this question without giving the young man an opportunity to explain his attitude.

THE COURT. That is not the usual method that prevails. Where the question can be categorically answered by yes or no, it should be answered. The explanation comes later. Then you can make any inquiry to the effect of giving the witness an opportunity of making whatever explanation at that time he sees fit to make, but under cross-examination counsel is entitled to

get an answer either yes or no, when the question can be so answered. You may proceed, please.

Did you love this country in the last week of May, 1917?—That is pretty hard for me to say in one word, Mr. Katzmann.

There are two words you can use, Mr. Sacco, yes or no. Which one is it?—Yes.

And in order to show your love for this United States of America when she was about to call upon you to become a soldier you ran away to Mexico?

MR. JEREMIAH MCANARNEY. Wait.

THE COURT. Did you?

Did you run away to Mexico?

THE COURT. He has not said he ran away to Mexico. Did you go?

Did you go to Mexico to avoid being a soldier for this country that you loved?—Yes.

You went under an assumed name?—No. [1867]

Didn't you take the name of Mosmacotelli?—Yes.

That is not your name, is it?—No.

How long did you remain under the name of Mosmacotelli?—Until I got a job over to Mr. Kelley's.

When was that?—The armistice.

After the war was practically over?—Yes, sir.

Then, for the first time, after May, 1917, did you become known as Sacco again?—Yes, sir.

Was it for the reason that you desired to avoid service that when you came back in four months you went to Cambridge instead of to Milford?—For the reason for not to get in the army.

So as to avoid getting in the army.—Another reason why, I did not want no chance to get arrested and one year in prison.

Did not want to get arrested and spend one year in prison for dodging the draft. Is that it?—Yes.

Did you love your country when you came back from Mexico?—The first time?

THE COURT. Which country did you say? You said—

United States of America, your adopted country?—I did not say already.

When you came back, I asked you. That was before you went.—I don't think I could change my opinion in three months.

You still loved America, did you?—I should say yes.

And is that your idea of showing your love for this Country?—[Witness hesitates.]

Is that your idea of showing your love for America?—Yes.

And would it be your idea of showing your love for your wife that when she needed you you ran away from her?—I did not run away from her.

MR. MOORE. I object.

THE WITNESS. I was going to come after if I need her.

THE COURT. He may answer. Simply on the question of credibility, that is all.

Would it be your idea of love for your wife that you were to run away from her when she needed you?

MR. JEREMIAH MCANARNEY. Pardon me. I ask for an exception on that.

THE COURT. Excluded. One may not run away. He has not admitted he ran away.

Then I will ask you, didn't you run away from Milford so as to avoid being a soldier for the United States?—I did not run away.

You mean you walked away?—Yes.

You don't understand me when I say 'run away,' do you?—That is vulgar. [1868]

That is vulgar?—You can say a little intelligent, Mr. Katzmann.

Don't you think going away from your country is a vulgar thing to do when she needs you?—I don't believe in war.

You don't believe in war?—No, sir.

Do you think it is a cowardly thing to do what you did?—No, sir.

Do you think it is a brave thing to do what you did?—Yes, sir.

Do you think it would be a brave thing to go away from your own wife?—No.

When she needed you?—No.

What wages did you first earn in this country?—Wage?

Wages, money, pay?—I used to get before I leave?

When you first came to this country?—\$1.15.

Per day?—Yes.

What were you getting at the 3-K factory when you got through?—Sometimes sixty, fifty, seventy, eighty, forty, thirty, twenty-five, thirty-five. Depends on how much work was.

That was within eight years after you first came to this country, isn't it?—After seven years,—no, after twelve years.

1908. I beg your pardon. That is my mistake, Mr. Sacco. I did not mean that. That is within thirteen years?—Yes, sir.

From the time you came to this country?—Yes.

From \$1.15 a day to \$5 a day or better?—Yes.

And your child was born in this country, wasn't it?—Yes.

And your marriage took place in this country?—Yes.

Is Italy a free country? Is it a republic?—Republic, yes.

You love free countries, don't you?—I should say yes.

Why didn't you stay down in Mexico?—Well, first thing, I could not get my trade over there. I had to do any other job.

Don't they work with a pick and shovel in Mexico?—Yes.

Haven't you worked with a pick and shovel in this country?—I did.

Why didn't you stay there, down there in that free country, and work with a pick and shovel?—I don't think I did sacrifice to learn a job to go to pick and shovel in Mexico.

Is it because,—is your love for the United States of America commensurate with the amount of money you can get in this country per week?—Better conditions, yes.

Better country to make money, isn't it?—Yes.

Mr. Sacco, that is the extent of your love for this country, isn't it, measured in dollars and cents?

MR. JEREMIAH McANARNEY. If your Honor please, I object to this particular question. [1869]

THE COURT. You opened up this whole subject.

MR. JEREMIAH McANARNEY. If your Honor please, I object to this question. That is my objection.

THE COURT. The form of it?

MR. JEREMIAH McANARNEY. To the substance and form.

MR. KATZMANN. I will change the form, if your Honor please.

THE COURT. Better change that.

Is your love for this country measured by the amount of money you can earn here?

MR. JEREMIAH McANARNEY. To that question I object.

THE COURT. Now, you may answer.

I never loved money.

MR. JEREMIAH McANARNEY. Save my exception.

THE COURT. Certainly.

What is the reason then?—

THE COURT. I allow this on the ground that the defendants opened it up.

What is the reason you came back?

MR. JEREMIAH McANARNEY. My exception lies just the same.

THE COURT. Certainly.

MR. MOORE. Both defendants.

THE COURT. Certainly.

What is the reason you came back from Mexico if you did not love money, then?—The first reason is all against my nature, is all different food over there, different nature, anyway.

That is the first reason. It is against your nature. The food isn't right.—Food, and many other things.

You stood it for four months, didn't you?—Three months.

Three months?—Yes.

You came back all right physically, didn't you?—I should say yes

And you had Italian food there, didn't you?—Yes, made by ourselves.

You could have had it all the time if you sent for it, couldn't you?—Not all the time. I don't know.

Did you fail to have it at any time in the three months you were there?—Yes, sir. Different.

What is the difference about it?—Oh, different food that we did not like.

It was Italian food, wasn't it?—No, sir.

Didn't you say it was?—Sometimes after.

You could have had it all the time if you sent for it, couldn't you?—Could have had beans sometimes and any other vegetable.

MR. KATZMANN. I ask that be stricken out and the witness required to answer the question. [1870]

Could you have had it by sending for it?—Could not get it all the time. Why couldn't you get it in Mexico the same as you get it here?—I suppose Mexico is not very much industries as in this country.

Couldn't you send to Boston to get Italian food sent to Monterey, Mexico?—If I was a D. Rockefeller I will.

Then, I take it, you came back to the United States first to get something to eat. Is that right? Something that you liked?—No, not just for eat.

Didn't you say that was the first reason?—The first reason——

Didn't you say that was the first reason?—Yes.

All right. That wasn't a reason of the heart, was it?—The heart?

Yes.—No.

That was a reason of the stomach, wasn't it?—Not just for the stomach, but any other reason.

I am talking first about the first reason. So, the first reason your love of America is founded upon is pleasing your stomach. Is that right?—I will not say yes.

Haven't you said so?—Not for the stomach. I don't think it is a satisfaction just for the stomach.

What is your second reason?—The second reason is strange for me, the language.

Strange language?—Yes.

Were you in an Italian colony there?—If I got them? I can't get that, Mr. Katzmann.

Pardon me. Were you in a group of Italians there?—Yes.

When you came to America in 1908, did you understand English?—No.

A strange language here, wasn't it?—Yes.

What is the third reason, if there is one?—A third reason, I was far away from my wife and boy.

Couldn't you have sent for your wife and your boy?—I wouldn't send for my wife and boy over there, because it was the idea to come back here.

I know that. You are back here. My question is, couldn't you have sent for Mrs. Sacco and your boy?—Extreme condition, it would be bad. I could not go back in this United States, why I would get my wife and my boy.

Your answer means, does it not, you could have had Mrs. Sacco and the boy come down there to live with you?—Yes.

You preferred to come back to this country?—Yes.

But you preferred to remain under the name of Mosmacotelli until the armistice was signed, didn't you?—Yes. [1871]

Now, is there any other besides those three reasons why you loved the United States of America?—Well, I couldn't say. Over here there is more accommodation for the working class, I suppose, than any other people, a chance to be more industrious, and more industry. Can have a chance to get anything he wants.

You mean to earn more money, don't you?—No, no, money, never loved money.

Never loved money?—No, money never satisfaction to me.

Money never a satisfaction to you?—No.

What was the industrial condition that pleased you so much here if it wasn't a chance to earn bigger money?—A man, Mr. Katzmann, has no satisfaction all through the money, for the belly.

For the what?—For the stomach, I mean.

We got away from the stomach. Now, I am talking about money.—There is lots of things.

Well, let us have them all. I want to know why you loved America so that after you got to the haven of Mexico when the United States was at war you came back here?—Yes.

I want all the reasons why you came back?—I think I did tell you already.

Are those all?—Yes. Industry makes lots of things different.

Then there is food, that is one?—Yes.

Foreign language is two?—Yes.

Your wife and child is three?—Yes.

And better industrial conditions?—Yes.

Is that all?—That is all.

[After objection the next question was reframed as follows:]

Did you find love of country among those four reasons?—Yes, sir.

Which one is love of country?—All together.

All together?—Yes, sir.

Food, wife, language, industry?—Yes.

That is love of country, is it?—Yes.

Is standing by a country when she needs a soldier evidence of love of country?

MR. JEREMIAH MCANARNEY. That I object to, if your Honor please [1872]. And I might state now I want my objection to go to this whole line of interrogation?

THE COURT. I think you opened it up.

MR. JEREMIAH MCANARNEY. No, if your Honor please, I have not.

THE COURT. It seems to me you have. Are you going to claim much of all the collection of the literature and the books was really in the interest of the United States as well as these people and therefore it has opened up the credibility of the defendant when he claims that all that work was done really for the interest of the United States in getting this literature out of the way?

MR. JEREMIAH MCANARNEY. That claim is not presented in anything tantamount to the language just used by the Court, and in view of the record as it stands at this time I object to this line of inquiry.

THE COURT. Is that not your claim, that the defendant, as a reason that he has given for going to the Johnson house, that they wanted the automobile to prevent people from being deported and to get this literature all out of the way? Does he not claim that that was done in the interest of the United States, to prevent violation of the law by the distribution of this literature? I understood that was the——

MR. JEREMIAH MCANARNEY. Are you asking that as a question to me?
THE COURT. Yes.

MR. JEREMIAH MCANARNEY. Absolutely we have taken no such position as that, and the evidence at this time does not warrant the assumption of that question.

THE COURT. Then you are not going to make that claim?

MR. JEREMIAH MCANARNEY. I am going to make whatever claim is legitimate.

THE COURT. I want to know what that is. You are going to claim in argument——

MR. JEREMIAH MCANARNEY. I am going to claim this man and Vanzetti were of that class called Socialists. I am going to claim that riot was running a year ago last April, that men were being deported, that twelve to fifteen hundred were seized in Massachusetts.

THE COURT. Do you mean to say you are going to offer evidence on that?

MR. JEREMIAH MCANARNEY. I am going to claim——

THE COURT. I am asking the claim. You must know when I ask the claim I mean a claim that is founded on fact, evidence introduced in the case, and not upon anything else.

MR. JEREMIAH MCANARNEY. We have not concluded the evidence, if your Honor please.

THE COURT. Do you say you are going to introduce evidence to that effect?

MR. JEREMIAH MCANARNEY. We have witnesses which we may introduce here. I do not know whether we will introduce them or not. [1873]

THE COURT. When you address me, I wish you would direct yourself to either evidence introduced or evidence you propose to introduce.

MR. JEREMIAH MCANARNEY. Your Honor now sees——

THE COURT. So I can pass judgment then upon that, and I cannot pass judgment as to the competency of something that may not be introduced and never come before me for consideration.

MR. JEREMIAH MCANARNEY. Your Honor now sees the competency of my remarks, when I said to your Honor that I objected to the question in the present state of the evidence?

THE COURT. Are you going to claim that what the defendant did was in the interest of the United States?

MR. JEREMIAH MCANARNEY. Your Honor please, I now object to your Honor's statement as prejudicial to the rights of the defendants and ask that this statement be withdrawn from the jury.

THE COURT. There is no prejudicial remark made that I know of, and none were intended. I simply asked you, sir, whether you propose to offer evidence as to what you said to me.

MR. JEREMIAH MCANARNEY. If your Honor please, the remarks made with reference to the country and whether the acts that he was doing were for the benefit of the country. I can see no other inference to be drawn from those except prejudicial to the defendants.

THE COURT. Do you intend to make that claim?

MR. JEREMIAH McANARNEY. What claim, please?

THE COURT. The one that I am suggesting.

MR. JEREMIAH McANARNEY. When this evidence is closed, if your Honor please, I shall argue what is legitimate in the case.

THE COURT. All I ask is this one question, and it will simplify matters very much. Is it your claim that in the collection of the literature and the books and papers that that was done in the interest of the United States?

MR. JEREMIAH McANARNEY. No, I make no such broad claim as that.

THE COURT. Then I will hear you, Mr. Katzmänn, on the competency of this testimony.

MR. KATZMANN. I am sorry I did not hear what Mr. McAnarney said.

THE COURT. Mr. McAnarney says it is not his claim, as I got it, he does not propose to make the claim that the collection and distribution of this literature was any matter to be done by either or both of the defendants in the interest of the United States.

MR. KATZMANN. Then, if your Honor please, I offer the line of cross-examination I have started upon as tending to attack the credibility of this man as a witness.

THE COURT. As to what part of his testimony? [1874]

MR. KATZMANN. As to any part of his testimony to affect his credibility as a witness *in toto*.

THE COURT. You can't attack a witness's credibility *in toto* excepting concerning some subject matter about which he has testified.

MR. KATZMANN. Well, he stated in his direct-examination yesterday that he loved a free country, and I offer it to attack that statement made in his examination by his own counsel.

THE COURT. That is what I supposed, and that is what I supposed that remark meant when it was introduced in this cross-examination, but counsel now say they don't make that claim.

MR. KATZMANN. They say they don't make the claim that gathering up the literature on May 5th at West Bridgewater was for the purpose of helping the country, but that is a different matter, not related to May 5th.

THE COURT. I will let you inquire further first as to what he meant by the expression.

MR. MOORE. If your Honor please, with all due respect to the Court, I desire to reserve an exception to the question that was asked,—interrogation that was asked as to the purpose of the testimony that was introduced on behalf of the defendant with reference to the issue of love of country; reserve an exception with all due respect to the Court.

THE COURT. Of course, gentlemen, you understand, and you should understand by this time, that the Court is simply to pass upon the competency of testimony that is offered. The Court has no opinion of any facts. You heard me say so. The Court has no opinion in reference to this matter. I made simply the inquiry with a view of ascertaining what the claim of counsel might be, what might be argued, and inasmuch as counsel said they made

no such claim, then I have reserved the right to pass upon the competency after inquiry has been made with reference to said testimony of the witness. I think you should know, and I repeat it, anyhow, there is no disposition, nothing has been said to do the slightest thing in any manner whatsoever to prejudice the rights of either of these defendants, and anything that has been said you will not consider it if anybody can draw such an inference. You will give it not the slightest consideration in the world. It deserves none, and you will give it none. The only question I was passing upon was the competency of testimony and nothing else. Questions are not evidence. Statements of counsel are not evidence. Statements by the Court are not evidence. You will be governed by absolutely nothing but testimony that is admitted and heard by you from the witnesses upon the stand. You may proceed.

What did you mean when you said yesterday you loved a free country?—First thing I came in this country—

No, pardon me. What did you mean when you said yesterday you loved a free country?—Give me a chance to explain.

I am asking you to explain now.—When I was in Italy, a boy. [1875] I was a Republican, so I always thinking Republican has more chance to manage education, develop, to build some day his family, to raise the child and education, if you could. But that was my opinion; so when I came to this country I saw there was not what I was thinking before, but there was all the difference, because I been working in Italy not so hard as I been work in this country. I could live free there just as well. Work in the same condition, but not so hard, about seven or eight hours a day, better food. I mean genuine. Of course, over here is good food, because it is bigger country, to any those who got money to spend, not for the working and laboring class, and in Italy is more opportunity to laborer to eat vegetable, more fresh, and I came in this country. When I been started work here very hard and been work thirteen years, hard worker, I could not been afford much a family the way I did have the idea before. I could not put any money in the bank. I could no push my boy some to go to school and other things. I teach over here men who is with me. The free idea gives any man a chance to profess his own idea, not the supreme idea, not to give any person, not to be like Spain in position, yes, about twenty centuries ago, but to give a chance to print and education, literature, free speech, that I see it was all wrong. I could see the best men, intelligent, education, they been arrested and sent to prison and died in prison for years and years without getting them out, and Debs, one of the great men in his country, he is in prison, still away in prison, because he is a Socialist. He wanted the laboring class to have better conditions and better living, more education, give a push his son if he could have a chance some day, but they put him in prison. Why? Because the capitalist class, they know, they are against that, because the capitalist class, they don't want our child to go to high school or to college or Harvard College. There would not be no chance, there would not be no,—they don't want the working class educationed; they want the working class to be a low all the times, be underfoot, and not to be up with the head. So, sometimes, you

see, the Rockefellers, Morgans, they give fifty,—mean they give five hundred thousand dollars to Harvard College, they give a million dollars for another school. Everybody say, 'Well, D. Rockefeller is a great man, the best in the country.' I want to ask him who is going to Harvard College? What benefit the working class they will get by those million dollars they give by Rockefeller, D. Rockefellers. They won't get, the poor class, they won't have no chance to go to Harvard College because men who is getting \$21 a week or \$30 a week, I don't care if he gets \$80 a week, if he gets a family of five children he can't live and send his child and go to Harvard College if he wants to eat anything nature will give him. If he wants to eat like a cow, and that is the best thing, but I want men to live like men. I like men to get everything that nature will give best, because they belong,—we are not the friend of any other place, but we are belong to nations. So that is why my idea has been changed. So that is why I love people who labor and work and see better conditions every day develop, makes no more war. We no want fight by the gun, and we don't want to destroy young men. The mother been suffering for building the young man. Some day need a little more bread, so when the time the mother get some bread or profit out of that boy, the Rockefellers, Morgans, and some of the peoples, high class, they send to war. Why? What is war? The war is not shoots like Abraham Lincoln's and Abe Jefferson, to fight for the free country, for the better education, to give chance to any other peoples, not the white people but the black and the others, because they believe and know they are mens like the rest, but they are war for the great millionaire. No war for the civilization of men. They are war for business, million dollars come on the side. What right we have to kill each other? I been work for the Irish, I have been working with the German fellow, with the French, many other peoples. I love them people just as I could love my wife, and my people for that did receive me. Why should I go kill them men? What he done to me? He never done anything, so I don't believe in no war. I want to destroy those guns. All I can say, the Government put the literature, give us educations. I remember in Italy, a long time ago, about sixty years ago, I should say, yes, about sixty years ago, the Government they could not control very much these two,—devilment went on, and robbery, so one of the government in the cabinet he says, 'If you want to destroy those devilments, if you want to take off all those criminals, you ought to give a chance to Socialist literature, education of people, emancipation. That is why I destroy governments, boys.' That is why my idea I love Socialists. That is why I like people who want education and living, building, who is good, just as much as they could. That is all.

And that is why you love the United States of America?—Yes.

She is back more than twenty centuries like Spain, is she?—At the time of the war they do it.

Are we in time of war now?—No.

Were we in time of war when you came back from Mexico?—Yes.

What did you come back for, then?—I told the reason why I came back.

All right. You don't get a good education in this country?—I don't see why they have a chance.

Do you get a better chance for education in Italy, I take it, from what you said?—I don't say Italy better education in this country.

You said you could work less hours over in Italy?—Yes.

You could get fresher vegetables?—Yes.

Better food, and it was a republic?—For the working class.

Why didn't you go back there?—Pretty hard for men to change when he establish in one place.

Why, you were to go back, weren't you?—Yes. [1877]

Why didn't you intend to stay back there when you went back?—Italy?

Yes, your native country?—I could not stay or not, because——

Have you said whether you were going to stay or not?—Yes, I was going to go.

Were you coming back?—I do not know, Mr. Katzmann.

Did you tell me you were coming back?—I couldn't say so.

Can't you remember what you said to me over in the Brockton police station?—I could not remember all the words, but I do remember some conversation between me and Mr. Kelley.

Never mind Kelley. I am talking about myself now. Didn't you tell me that you were coming back to this country in two or three months?—Well, if I did——

Did you?—I could not remember, Mr. Katzmann, if I did.

Wasn't that your intention to come back?—I couldn't say yes, because probably I could remain in Italy because my father is old. I could get his business over there.

Were you going to have your father support you?—What? Support me, my father?

Yes.—No.

Were you going to take your wife and child over?—Yes.

You could not go back to Italy, you say, because it would be a hardship, but you could take your wife and child back for a vacation; is that right?—No, not vacation.

Wasn't it a vacation?—No, sir.

Were you going to work while you were over there?—Certainly. I could not work without work. I love work.

You love work?—Yes.

Do you love it as much as you love this country?—Well, I think men is a great work,—greater profit for the country, too.

Do you love work as much as you love the United States?—The reaction of the United States I did not like.

When you came over to this country, you had certain ideas, didn't you of what was here?—No.

Didn't you say when you came over you were thinking about education, building for your family, and raising a family?—Yes, but I was a Republican in my country.

Didn't you say that you had those ideas of this country when you came here?—Yes.

And didn't you say when you came you saw a difference?—Yes.

And the things were better in Italy than they were here?—No, not that.

In substance, haven't you said that in this long answer you gave? [1878]

—No. Buy fruit more fresh for the working class, but no education and other things. It is just the same.

Didn't you say you did not have to work so hard in Italy?—Yes.

That you could live just as well in Italy?—Yes.

And that there was better food?—Yes.

And fresher vegetables in Italy?—Yes.

Why didn't you go back?—Well, I say already——

Say it again. Why didn't you go back when you were disappointed in those things?—I say men established in this country, it is pretty hard to go back, change mind to go back.

Pretty hard to change your mind?—Yes.

You say on April 15, 1920, you were in Boston getting a passport to go back with your wife and children?—Yes. That is not the reason I go back to the old country, for the fruit, but to see my father. For twelve years I never saw him, my brother, my sister, or my folks.

It is just as easy, isn't it, to go back to see your father as to go back for fruit. You go back in either case?—I do the greatest sacrifice in the life to go there.

To go back to a country where you get those things and could not get them here,—is that a sacrifice?—No. The great sacrifice is to see my folks.

[A question was objected to and not pressed after conference at the bench.]

Do you remember speaking of educational advantages before the recess?—Yes, sir.

Do you remember speaking of Harvard University?—Yes, sir.

Do you remember saying that you could not get an education there unless you had money? I do not mean you used those exact words. I do not contend you did, but, in substance, didn't you say that?—They have to use money in the rule of the Government.

No. You don't understand. Did you hear it, perhaps?—I can't understand.

I will raise my voice a little bit. Did you say in substance you could not send your boy to Harvard?—Yes.

Unless you had money. Did you say that?—Of course.

Do you think that is true?—I think it is.

Don't you know Harvard University educates more boys of poor people free than any other university in the United States of America? [1879] [Objection by Mr. McAnarney was overruled.]

Do you know that to be the fact?—How many there are?

What?—How many.

How many?—Don't you know that each year there are scores of them that Harvard educates free? [Objection by Mr. McAnarney was overruled.]

The question is, do you know?—I can't answer that question, no.

So without the light of knowledge on that subject, you are condemning even Harvard University, are you, as being a place for rich men?

Did you intend to condemn Harvard College? [Objection by Mr. McAnarney was overruled.]—No, sir.

Were you ready to say none but the rich could go there without knowing about offering scholarships? [Objection by Mr. McAnarney was overruled.]—Yes.

Does your boy go to the public schools?—Yes.

Are there any schools in the town you came from in Italy that compare with the school your boy goes to?

MR. JEREMIAH MCANARNEY. I object.

THE COURT. Isn't this quite a good way now from that? Of course, I see, or think I see, what you have in mind eventually, but it seems to me the boy going to school is quite a considerable distance.

Does your boy go to the public school?—Yes.

Without payment of money?—Yes.

Have you free nursing where you come from in Stoughton?—What do you mean?

A district nurse?—For the boys? [1880]

For anybody in your family who is ill?—I could not say. Yes, I never have them in my house.

Do you know how many children the city of Boston is educating in the public schools free?—I can't answer yes or no.

Do you know it is close to one hundred thousand children? [Objection by Mr. McAnarney was overruled.]—I know millions of people don't go there.

Did you have some circulars and books in your house on May 5th?—Yes.

How long had you had them there?—Well, I buy little by little when I have a chance to buy books.

How long?—When I have money to buy.

How long in all had you had them there?—In the house?

Yes.—I should say beginning when I came to this country, some books. Always were there right along after.

Are they written in English?—Some.

And in what other language?—Italian. The most of them.

Printed in this country or in Italy?—I couldn't say, but the most they are printed in Europe.

The continent you left behind you?—And some is printed in America.

Yes. And do you subscribe to any papers?—Literature?

Yes, literature in the sense of not books. I was trying to distinguish.—Yes.

What papers? [Objection by Mr. McAnarney was overruled.]—You mean a paper or books?

Papers?—You mean I could say the paper I get every day? [1881]

Yes, please.—I will. I used to get *Le Mortello*.

Where is that printed?—In New York City.

In English or Italian?—In Italian.

What other paper? Is that a daily?—No, weekly.

Weekly.—Every 15 days.

Fortnightly?—Yes, I used,—before the war, I used to get a Cronaco Sovorseva.

Is that a daily or a weekly?—Weekly.

Printed where?—Lynn.

Was the printing of that paper stopped during the war?

MR. JEREMIAH McANARNEY. I object.

—Mr. Katzmann, if you give me a chance to say some other papers.

MR. JEREMIAH McANARNEY. Mr. Sacco, when I object, kindly stop.

THE COURT. What is your objection?

MR. JEREMIAH McANARNEY. To the question.

THE COURT. What is your objection?

MR. JEREMIAH McANARNEY. My objection is that question is immaterial; the answer is immaterial.

THE COURT. I don't know. Supposing the character of this literature became important? Does it not become material on the question of credibility? In other words, there may not be anything in these at all that would warrant deportation. Then, if there is nothing in that, in the literature, that is evidence attacking the credibility of the witness, is it not?

MR. JEREMIAH McANARNEY. In view of the state of the record that question, to my mind, is not material now.

THE COURT. It goes to test, as I take it, does it not, Mr. District Attorney, the credibility of the witness with reference to the collection and distribution of the circulars, books and literature?

MR. KATZMANN. Of May 5th.

THE COURT. That is what I understand is the purpose. You may proceed, if that is the purpose.

MR. JEREMIAH McANARNEY. Will your Honor kindly save an exception?

THE COURT. Certainly.

Was the printing of that paper stopped during the war?—Yes.

Was the printing of Le Mortello stopped during the war?

MR. JEREMIAH McANARNEY. The same objection.

—Yes.

MR. JEREMIAH McANARNEY. Wait a minute.

THE COURT. If it was stopped, then it could not have been the date.

MR. KATZMANN. May not have been destroyed, if your Honor please.

THE COURT. Supposing you deal more particularly with literature that was published and literature that was in the mind of the witness at the time when they sought to get the automobile. [1882]

MR. KATZMANN. If your Honor please, I am starting at his house with just that subject matter.

THE COURT. All right.

MR. KATZMANN. My initial questions asked what he was taking.

THE COURT. Yes. Eventually to show that the character of these other publications—

MR. KATZMANN. Yes, I propose to ask him.

THE COURT. At the time, to wit, on May 5th—

MR. KATZMANN. —1920, and if he knew of these papers being in other people's houses.

MR. JEREMIAH McANARNEY. Kindly save me an exception.

THE COURT. Certainly.

THE WITNESS. I used to read some other paper.

MR. KATZMANN. Wait. I do not think you have answered the last question.

Was the printing of *Le Mortello* stopped during the war?—Yes.

What other papers did you have in your house on May 5th?—It is published now.

Yes, it is published now?—Yes. In the time of the war, too, it was stopped for a little while.

What other papers did you have in your house on May 5th, 1920?—I read, —I buy *Boston Globe* every morning.

What other papers?—I read *Boston American* every night.

What other papers?—Some papers from Italy, too. Some other Socialist papers from Italy.

Some other Socialist papers from Italy?—Yes.

Were all those papers except the *Boston Globe* and the *Boston American*, or copies of them, in your house—— —No.

—On May 5th?—They all used to destroy when I finished reading.

Didn't you have any of those papers in your house May 5th?—Yes, some good literature I keep.

I am asking about papers, first.—Yes.

What papers did you have on May 5th in your house?—You mean books?

No.—Just the papers?

I mean papers, newspapers, or periodicals?—I got some every kind literature.

All these kinds that you have mentioned, *Le Mortello*?—Yes.

Cronaco Sovversa?—Yes.

The papers from Italy?—Yes.

Were they Socialist papers?—Yes, sir.

They anarchistic papers?

MR. JEREMIAH McANARNEY. I object. [1883]

THE COURT. What is the objection to that? As I understand it, the papers, under your theory, were of such a character that he was going to collect them and dispose of them some way.

MR. JEREMIAH McANARNEY. The objection is that the question is incompetent, immaterial and irrelevant at the present state of the record.

THE COURT. I will admit it on the ground that I have already stated.

MR. KATZMANN. Yes. I propose to follow it up step by step.

MR. JEREMIAH McANARNEY. Save an exception.

THE COURT. Certainly.

Were they anarchistic?—Some of them:

Were any of the books that were in your house anarchistic?—Yes, some.

[Objection by Mr. McAnarney was overruled.]

How many of them?—I never counted.

About how many?—All together, you mean? All the literature?

No, I do not mean all the books you had, but all the books you had that were anarchistic and all the newspapers or periodicals you had that were anarchistic on May 5, 1920, in your house?—Quite a good many books.

How many?—You want me to name those books?

No. I want the number, not name.—I never counted them.

Was it a dozen?—More than a dozen.

Two dozen?—More.

Three dozen?—Yes, I guess so.

That is about right?—Yes.

What size books were they?—Some sizes four or five hundred pages. Some size two hundred. Some size one hundred. Some size two thousand. Some size four thousand. Many size.

Could you have carried those books out of your house yourself unassisted in two or three or four trips in your arms?—No, sir.

How many trips would it take you?—I should say a dozen.

A dozen. You were home from Monday noon, May 3d, weren't you, until the night of May 5th? I withdraw that. I am in error. You were home Monday afternoon, May 3d, weren't you?—Yes.

You were home Monday night, May 3d?—Yes.

You talked with Vanzetti on Sunday, May 2d?—Yes.

You had heard this terrible report from New York, hadn't you?—Yes.

Did you make any move Monday afternoon to take any of those things out of your house?—No.

Did you make any move Monday night to take them out of your house?—No. [1884]

Tuesday night?—No.

All day long Wednesday?—No.

Did you know Fruzetti, of Bridgewater, who was deported you said?—Yes.

Did you know him personally?—Yes, sir.

Been to his house?—I met him lots of times.

In Boston?—In conference.

Talked with him about anarchy, haven't you?—Certainly.

Did you know his views on anarchy?

MR. JEREMIAH McANARNEY. I object.

—His words?

MR. KATZMANN. Wait a minute. It wasn't "words."

Was his 'views.' Don't answer.

THE COURT. Supposing he should say he was a constitutionalist or something of that kind. Doesn't that tend to attack his credibility that one of the reasons why there was to be a disposition to be made of these papers was on the ground this man had been deported, among others?

MR. JEREMIAH McANARNEY. He put that situation into one word. The

question puts this whole situation, frames it into one word. I object to that question.

THE COURT. What was the question?

MR. KATZMANN. 'Were you aware of his views—Fruzetti's views, with respect to anarchy?'

THE WITNESS. We have an argument.

MR. KATZMANN. Wait a minute.

THE COURT. You may answer that by yes or no.

Did you know what they were, yes or no?—I can't answer yes or no. [Objection by Mr. McAnarney was overruled.]

Did you know what they were?

MR. JEREMIAH McANARNEY. That is objected to. The same question.

MR. KATZMANN. Yes, it is the same question repeated.

THE COURT. You may answer.

THE WITNESS. Repeat again, because I can't understand.

MR. KATZMANN. All right.

Did you know what Fruzetti's views were with respect to anarchy?—I just take Mr. Ross, please.

MR. KATZMANN. All right, Mr. Ross.

[Through the interpreter.] Were you aware of Fruzetti's views with respect to anarchy?

MR. JEREMIAH McANARNEY. Mr. Ross, will you kindly keep your voice up? [1885]

MR. ROSS. All right.

MR. KATZMANN. And you, too, Mr. Witness, keep your voice up.

—Well, by the paper.

MR. JEREMIAH McANARNEY. I do not want to rise too much. This is the same question, if your Honor please, now, through the interpreter, that I objected to.

THE COURT. This is simply a question of what he knows. He may answer that by yes or no.

As you learned his views by the paper, were your views the same?

MR. JEREMIAH McANARNEY. That I object to.

THE COURT. Is that of any importance?

—By the paper.

MR. KATZMANN. Wait a minute. On the question of fear of deportation.

THE COURT. Did he say he was—

MR. KATZMANN. Yes. He said this man Fruzetti was deported.

THE COURT. Exactly. But has the witness said he was afraid that he personally might be deported?

MR. KATZMANN. He said his friends; and I will ask him that.

Were you afraid of deportation yourself on May 5th? [Objection by Mr. McAnarney was overruled.]—Yes, sir.

Do you need Mr. Ross any more?—No.

[The next question was withdrawn after objection.]

You say you have talked with Fruzetti?—Yes, sir.

In your talks with him, did you learn what his views were with respect to anarchy? [Objection by Mr. McAnarney was overruled.] [1886]—The way he expressed, he was a very gentleman.

Pardon me, sir. I did not ask you that, whether he was a gentleman or not. I asked you if you learned what his views were with respect to anarchy.

MR. KATZMANN. I ask the other answer be stricken from the record, if your Honor please.

THE COURT. It may be.

Yes or no, Mr. Sacco. Did you find out what he thought about anarchy?—Why he find out?

No. Did you find out from him what he thought, what his views were with respect to anarchy?—Yes, sir.

Did your views coincide with his? [Objection by Mr. McAnarney was overruled.]—I don't get your,—I can't get you.

I will put it easier. Were your views the same as his?—I don't think we agree just the same way. In some ways different, anyway.

Were your views with respect to anarchy substantially the same as Fruzetti's?

MR. JEREMIAH MCANARNEY. That is the same objection.

—I could not say if I do.

MR. JEREMIAH MCANARNEY. I do dislike to be getting up.

THE COURT. I would rather you make an objection and then we will know where we stand on each question.

What is your answer?

THE COURT. You may answer.

—I could not see as far as he could.

As far as you could see, did you go along the same path with him? Did you have the same views, as far as you could see them?—Men never,—men can see far to last—

MR. KATZMANN. I don't understand. Mr. Ross, please, unless you object to him. I want to make sure we have your answer.

The question, perhaps,—do you understand the question?—Yes.

All right. What is the answer?—[Through the interpreter.] A man, in order to be of the same opinion and to have the same ideas, he should read the books what anarchists means.

[The witness talks to the interpreter, after saying 'No.']

THE WITNESS. [Through the interpreter.] A man must read his books to the extreme, the extreme, the foundation of those books, then to know what anarchist means. [1887]

MR. KATZMANN. I ask that be stricken out, if your Honor please, as not being responsive.

Now, will you please pay attention to my question.

THE COURT. The defendant Vanzetti wants to speak to one of his counsel.

MR. KATZMANN. Shall I suspend, your Honor?

THE COURT. You better, for a minute. Shall we proceed, Mr. Moore? All right.

MR. KATZMANN. Yes?

The question is this: as far as you understood Fruzetti's views, were yours the same? [Objection by Mr. McAnarney was overruled.]

Answer, please.—[Through the interpreter.] I cannot say yes or no.

Is it because you can't or because you don't want to?—[Through the interpreter.] Because it is a very delicate question.

It is very delicate, isn't it, because he was deported for his views?

MR. JEREMIAH McANARNEY. I object.

MR. KATZMANN. I withdraw it.

Was Fruzetti deported for his views?

MR. JEREMIAH McANARNEY. To that I object, too.

THE COURT. Didn't you bring out the fact that Fruzetti was deported?

MR. JEREMIAH McANARNEY. Yes, if your Honor please.

THE COURT. Now, is he limited to that so that he cannot make inquiry with reference to Fruzetti, about this deportation about which you have inquired?

MR. JEREMIAH McANARNEY. No.

THE COURT. For instance, supposing it should turn out that he had no views, anarchistic or anything of that kind, as bearing on the credibility of the witness, because that is one of the reasons that I understand caused the collection of the literature, because he was one of the men who had been deported.

MR. JEREMIAH McANARNEY. Fruzetti may have been deported for having one of these periodicals in his house. He may have been deported for many things——

THE COURT. See if he knows the reason.

MR. JEREMIAH McANARNEY. [Continuing.] —that have not appeared.

Do you know why Fruzetti was deported?—[Through the interpreter.] Yes.

Was it because he was of anarchistic opinions? [1888]

THE INTERPRETER. He says he understands it now.

Was it because Fruzetti entertained anarchistic opinions?—One reason, he was an anarchist. Another reason, Fruzetti been writing all the time on the newspapers, and I am not sure why the reason he been deported.

You do not know which of the two it was?—Yes.

You did not read that in your paper?—Probably I forget. Probably I miss that, I don't know.

Wasn't it the fact on record,—on consideration isn't it the fact that he was deported because he held and entertained anarchistic views?—Yes.

MR. JEREMIAH McANARNEY. That I object to.

THE COURT. You are referring to a record now. Of course, he can't testify as to what the record was.

Who was the other man? Oh, pardon me. Was Fruzetti, before deportation, a subscriber to the same papers that you had in your house on May 5th?—Probably he is.

MR. JEREMIAH McANARNEY. I object, if your Honor please.

THE COURT. Is that of much consequence? He already stated why Fruzetti was deported.

MR. KATZMANN. Perhaps it isn't. Yes, I think that is correct.

Who was the other man that you said was deported from Bridgewater?—I did not say; I am sure there is another man been deported, but I do not know the name.

See if I can refresh your recollection. Was it Ferruccio Coacci?—He is one. There is another one.

Who was the other man?—I do not remember the name.

Now, you said, did you not, this morning, the first thing when recalled to the stand, that it was your plan to go to Brockton that night, May 5th, and warn your friends to have these books, circulars and papers in the valise ready to be taken out?—Yes.

Yes. Were those persons to whom you intended to go that Wednesday night, subscribers to the same paper that you were, same papers?—Have got any literature?

Have you seen the literature they had?—Men love an idea, socialist or anarchist, any other thing they had.

You believed they had that night?—Sure.

You believed they had books similar to yours, too, did you not?—Because some—

Pardon me. Answer that question. Did you believe that they had in their homes books similar to the ones you had in your house?—Yes.

And the books which you intended to collect were books relating to anarchy, weren't they?—Not all of them.

How many of them?—Well, all together. We are Socialists [1889] democratic, any other socialistic information, Socialists, Syndicalists, Anarchists, any paper.

Bolshevist?—I do not know what Bolshevism means.

Soviet?—I do not know what Soviet means.

Communism?—Yes. I got some on astronomy, too.

I did not ask you what you had. You weren't afraid the books of astronomy were going to be taken by anybody, were you?—No.

You knew I did not mean that, didn't you? You understood I didn't mean that, didn't you? Will you answer that?—Yes, sir.

Nor any books you had on arithmetic or spelling, either. Did you expect the officers of the law were going to seize your wife's cook book?—No, sir.

Were you afraid to have those books and those papers in your house?—At that time.

In that time. On May 5th.—Well, all the rest.

All during the reaction?—Yes.

Then you mean before May 5th, don't you?—Yes, at the time.

How long before May 5th?—I should say a couple of weeks. Three weeks, a month.

You never made a move to take them out of your house, did you?—We never heard before.

You heard on May 2d, didn't you?—Yes.

You were home that night, weren't you?—Yes.

It was a matter of ten or fifteen minutes to get them out, wasn't it?—Oh, no.

A half hour?—Oh, no.

An hour?—Where was I going to bring them?

Weren't there woods by your house?—I don't want to destroy because I love those books.

You weren't going to destroy them?—I was going to keep them.

You were going to keep them and when the time was over, you were going to bring them out again, weren't you?—Yes.

And you were going to distribute circulars?—Education literature.

And you were going to distribute circulars, weren't you?—It costs money to sacrifice.

You were going to distribute those papers, weren't you?

MR. JEREMIAH MCANARNEY. The question, were you?

Were you?—What do you mean, destroy?

No, not destroy him. After the time had gone by, were you going to bring them out, going to distribute the knowledge contained in them?—Certainly, because they are educational for book, educational. [1890]

An education in anarchy, wasn't it?—Why, certainly. Anarchistic is not criminals.

I didn't ask you that if they are criminals or not. Nor are you to pass upon that, sir. Was it equally true as to the books and papers and periodicals that you expected to pick up at your friends' houses, that they were not to be destroyed?—Just to keep them, hide them." [1891]

On further cross-examination Sacco admitted having lied to Katzmann about where he had bought the cartridges in his possession [1895] but maintained that his false statement about buying the gun had been made because he had not remembered the facts [1896]. At one point in the testimony he said he had known when he made his statement that it was untrue [1896]; at another point he declared it had been an innocent mistake because he had not remembered [1897], and finally, that probably Katzmann had forced him to say some things and that he had understood wrong [1898]. His statement at Brockton, that the cartridges had been in a new box, he admitted as false [1900] and he also admitted that telling the truth about these cartridges would not have helped the police arrest his friends [1901]; but he was not sure even so that he had remembered about the cartridges at the time. [1902]

Sacco admitted that he had been confronted with Mrs. Johnson at the Brockton Police Station and had then denied ever having seen her before [1906–1908]. He explained this by saying that he was at first not sure whether she was the woman he had seen. He also admitted that at Brockton he had denied ever having been at the Johnson house [1909]. He likewise falsely stated at Brockton that he had never been at Orciani's house and did not know where Orciani lived. [1911, 1919]

Sacco did not recall whether Katzmann had asked him about Berardelli but he admitted he had read in the newspapers on April 16th or 17th that Berardelli had been shot [1894]. He said that at the time of his talk with Katzmann he had forgotten about the Braintree murder.

"And before you ever saw me upstairs, hadn't you been looked over by thirty or thirty-five people, as you said yesterday?—One day.

That day before you saw me?—Yes.

And you did not know what we had you there for?—No.

Didn't have any idea?—No, sir.

Didn't have any idea when I asked you if you knew Berardelli, and you said: 'No. Who is this Berardelli?'—Well, fellows read one day the paper. He could not remember.

That did not bring anything back to your mind?—No.

Three weeks afterwards?—No. What a fellow can remember that?

Can't you remember back three weeks?—Well, there isn't anything that interested me to remember.

Wasn't it of any interest to you that there was an atrocious murder committed in South Braintree?—One, two, three day and then stop. The paper stop and people was,—and I did forget.

And you forgot about it?—Certainly." [1912]

He admitted having lied about never having worked in South Braintree. His reason for this, he said, was because he had been a slacker:

"Why, Mr. Sacco?—Because I am not registered I am a slacker. Then, another thing, I don't want you to find that literature and then I won't be in trouble, that is all." [1912]

He had falsified about working in Braintree because he did not want them to find out his second name, he said. When arrested he had given his real name and not the assumed one under which he had worked at Braintree in 1918.

"Then you gave me all the information I needed if I was after you for being a slacker, didn't you?—If I told you I was then working in Rice & Hutchins' factory, I would tell you the second name to find out, so that is why I keep it back.

So you told me your real name, Nicola Sacco?—Yes.

And you expected to escape punishment for being a slacker by telling me your real name. Is that it, Mr. Sacco?—Yes; and some other thing, books and literature.

You took the name of Mosmacotelli to escape punishment for being a slacker, didn't you?—Yes.

Well, then, in telling me your real name, Sacco, you weren't trying to evade punishment for that, were you?—Yes.

How do you explain that.—Well, to find out the things and punish a year

in prison for a slacker. [1912] . . .

Now, wait a minute. Do you say you hoped to conceal about the literature and about the draft by telling me falsely that you had never worked in Braintree?—About, there is one thing in that not to be on the registration. And another thing, I did not remember very well, because I work only seven or eight days so I could not remember very sure. At that time I had been past four or five factories, working. I could not remember, you know, right off if I work five or six days. I work in other places carrying the board. I work about three days. My shoes all broke, and I left. I could not remember. I did not tell you that, either. Of course, lots of fellows can remember all.

Now, let us go back again. Slacker punishment and literature were the two things that made you falsify?—Yes, sir.

Did you tell me where you actually lived?—Well, I was living—

Where you were living that night?—Yes.

And you had literature right in your own house then, didn't you?—Well, I don't think he could keep back his home, where he was living.

Why couldn't you falsify about that the same as many other things? What?—I think they could find that after a minute.

All right. Do you think telling me you lived in Stoughton near the 3-K factory helped cover up the literature you had in your house?—Repeat it again.

Do you think that telling me you lived in Stoughton near the 3-K factory helped cover up the fact you had,—helped conceal from me the fact you had literature in your house?—No, sir." [1913]

Sacco added that he had known at the time that the people who looked him over were "looking for some crime." He stated he had told Katzmman he thought he had been working on the day before he read about the Braintree crime [1947] and admitted this statement was false:

"And why did you tell me that falsehood, Mr. Sacco?—Well, of course, I never remember.

Why didn't you say you did not remember?—Well, probably I could not figure it out that time.

You could not figure it that time?—No.

You figured you read it in the Boston Post the day after it happened, didn't you?—Yes.

That is true, you read it the next day?—Yes.

And you read it with friends in the shop?—Yes.

Well, that was the 16th of April, wasn't it?—Yes.

And then I asked you if you worked all day long the day before and you said, 'Yes,' didn't you?—If I said it, it was true.

Was it true you worked all day long April 15th?—April 14th.

April 15th, the day before the 16th, I ask?—If I say I worked, I was lie.

Why did you tell me that lie?—Because I was not sure.

Why didn't you say you weren't sure?—I could not remember exactly.

If you were in Boston on the 15th day of April, getting your passports,

why didn't you tell me that the night I talked with you at Brockton? -- If I could remember I would tell you right off.

You could remember about reading it in the paper?—Yes.

Reading it in the paper the day after it happened?—Yes.

Was that your purpose in telling me a falsehood, Mr. Sacco?—There was not interest to me very close to find out the date I have been out.

It wasn't interesting to you very close?—No, I did not see no interest.

After thirty people, strangers, had looked at you?—No, because I did not think it was going on.

After I had asked you if you ever worked in Braintree?—What of it?

After I had asked if you ever tried to get work in Braintree? What do you say to that, Mr. Sacco?—I don't say no fault. [1948]

After I asked you if you knew Berardelli or who Berardelli was, did you see anything about that?—Well, yes, I could see.

After I asked you, you could see then, couldn't you?—Yes.

That was before I asked if you knew something had happened in Braintree the month before I was talking with you?—I did not remember when you mentioned the name Berardelli.

You did not remember it then?—No.

When I asked you if you heard anything about a happening in Braintree the month before I was talking with you, you knew then what I was talking about, didn't you?—I can't get that.

When I asked you if you had heard about anything happening in Braintree in the month before I was talking with you, you knew then what I meant, didn't you?—The month before?

Yes, that would be April.—The month before April?

No, the month before May. We were talking on May 6th?—Yes.

The month before was April. You knew what I referred to then when I asked you that question, didn't you?—I did not get your question yet.

You don't get it yet. When I asked you the question:

'Q. Did you ever hear anything about anything happening in Braintree in the last month?'

That means April?—Yes.

Did you reply, 'Yes'?—Yes.

You knew what I meant, then, didn't you?—Well, yes.

You knew I was talking about the South Braintree murder, didn't you?—Yes." [1949]

On the next day Sacco requested the assistance of the interpreter:

"THE WITNESS. Oh, excuse me, I like to say, Judge, to get the interpreter. I have been thinking yesterday I did make some mistake. I understand wrong. I think I would like to have the interpreter if I could.

THE COURT. What?

THE WITNESS. If I could have the interpreter.

THE COURT. Why didn't you tell me so yesterday?

THE WITNESS. I been thinking over last night I did answer something wrong. Probably I did not understand something.

THE COURT. The only thing I regret,—I told you at the beginning if there was any question you did not understand, to let me know and I would see that you did understand. I regret that you did not. Let Mr. Ross come forward. Do you wish to be heard, Mr. Katzmänn?

MR. KATZMANN. No, your Honor.

[The following testimony is given through interpreter.]

Yesterday afternoon at adjournment I had gotten to this point in examining you about what you told me at Brockton about April 15th.—Yes, sir.

And the last three questions I was asking you about were as follows:

'Q. Were you working the day before you read it in the paper? A. I think I did.'

Did you tell me that?—I said, 'Yes.'

And then do you recall my asking you:

'Q. Well, do you know.' And your answer: 'Sure.'—No.

THE COURT. I think you should speak louder. I know the defendant Vanzetti can't hear what you are saying.

THE WITNESS. I told you that I went to the Italian consul several times and I wasn't sure if I was working or not.

MR. KATZMANN. I ask that answer be stricken out, if your Honor please.

THE COURT. It may be.

The question was, do you recall that question and that answer?

MR. KATZMANN. May I have that answer stricken out?

THE COURT. Yes.

I am asking you if you remember this question and your making this answer at Brockton:

'Q. Well do you know? A. 'Sure.'

Did you say that?—Well, I don't remember if I said it, whether I said it or not, but if I said it it isn't the truth.

And do you remember this question and this answer:

'Q. Worked all day?' That is the question. The answer: A. 'Yes, sir.' [1950]

Did you say that to me at Brockton?—I don't remember if I said it. If I said it, that wasn't true. I told a lie." [1951]

Sacco at this point said he was not sure of having told Katzmänn at Brockton that he knew he had worked on that Thursday [1953]. He said, finally:

"Why did you tell me a falsehood that on Thursday, the day before you read the account in the paper, you worked all day?"

THE WITNESS. Well, I did not remember for certain. I said that I had been out two or three days.

If you did not remember for certain, why didn't you say so?—It appears to me that I told you that several times." [1954]

He was asked about some questions and answers at Brockton relating

to his visit early in April to the consul's office; but about these he was not sure [1958-1960]. Part of the statement given at Brockton was later read to the jury:

"Did you ever take a whole day off in April to look for your passports all day?—Yes, I did.

What day?—I think either Tuesday or Wednesday.

What Tuesday or Wednesday in April?—Well, I don't remember. Either the 5th or 8th of April, or the 10th, I don't remember. I can't say for sure. This was in April I lost a day to fill out the income tax, and I do not remember, but I can tell it from the factory the day I was out a full day.

There was only one day you were out a full day for your [2217] passport before this week?—Only one single day that I lost a whole day's work to inform myself in regard to the passports.

When was that, last Tuesday or some Tuesday before that day?—I think it was the beginning of the month of April. Ever since I received a letter from home, and then I started to investigate about the passports. . . .

Do you know Berardelli?—No, Who is this Berardelli? . . .

Where did they rob the money?—Over near Rice & Hutchins. I don't read English very well, but there was bandits in Braintree, and I think it was at Rice & Hutchins.

Did you read it the next day in the paper?—Yes, with some of the friends in the shop.

Were you working the day before you read it in the paper?—I think I did.

Well, do you know?—Sure.

Worked all day?—Yes, sir.

I suppose that the next day after that bandit affair near Rice & Hutchins in Braintree you read it in the paper, the Boston Post on the next day, didn't you?—Yes, sir, the next morning.

The day before you read it in the paper, did you work all day?—I think so, but I don't remember for sure if I stayed out half day, I don't know.

Did you stay out all day the day before?—I don't remember whether it was on Wednesday or Thursday.

It was Thursday.—I think I worked Thursday.

Are you sure?—Yes.

Sure?—I think so.

You said you loafed one full day in April. That was about the 5th of April. Is that right?—Yes." [2118]

Sacco admitted he had lied to Katzmann about not knowing Boda and claimed he had wanted to keep from the police the fact that Boda was a radical. He said Stewart had known that he, Sacco, was a radical and that he thought Katzmann had also known it. He contradicted himself a moment later, however, saying that Katzmann, he thought, had not known it. He admitted he had not known where Boda lived, not even in which town, and said finally: "If I say I know Boda you will ask me a lot of questions—if he was a radical or anything, if he was a very good friend of

yours.' " [1917]

At another time he was asked about his denial that Vanzetti and Orciani had known each other:

"We could not do any more than arrest them, could we?—I don't know.

Well, the only hope you had by telling these falsehoods, was it not, was to avoid arrest of your friends?—Certainly.

Well, they were both arrested then, weren't they?—Yes, but——

Then, how would concealment of that fact that Vanzetti knew Orciani help avoid arrest?—[Witness hesitates.] [1920]

Can't you answer that?—I gave the answer already, some question, about Radicals.

The same answer?—Yes.

Do you think that is consistent, Mr. Sacco?—Well, consistent for me.

Seems consistent to you?—Yes. Another thing, I am not responsible to say who he is if he is Radical." [1921]

Sacco admitted that the witnesses who looked him over had had nothing to do with radicalism:

"You said this morning in your direct examination, didn't you—— —Yes. —that they made you stoop down and point and,—as if pointing a revolver?—Yes.

Did you think that had anything to do with collecting books?—No, sir.

Or papers?—No, sir.

Or Radicalism?—No, sir.

You knew on the 16th or 17th, when you read the paper, a man named Berardelli had been shot, didn't you?—Yes.

And you did not know what we were asking you questions about, did you?—No, sir.

And you are a man who tells this jury that the United States of America is a disappointment to you?

MR. JEREMIAH McANARNEY. Wait a minute. I object.

MR. KATZMANN. On the question of intelligence, if your Honor please. [1922]

THE COURT. Not quite, and you assume, too.

MR. KATZMANN. I assumed on the question of intelligence?

THE COURT. You assumed 'you are the man.'

MR. KATZMANN. 'Are you the man?' That this man passed judgment on the United States of America? [Objection by Mr. McAnarney was overruled.]

Are you, Mr. Sacco?—I don't—I can't understand this word.

'Passed judgment'?—Yes, sir.

Well, told us about how disappointed you were, and what you did not find and what you expected to find. Are you that man?—Yes." [1923]

Sacco was asked about the meeting scheduled for May 9th, 1920:

"You were going to talk in a public hall and weren't afraid of that, or,

he was going to talk there, and you weren't afraid of that?—Well, we took a chance.

You took a chance on that, and you lost out on the chance, didn't you, because we had the notice. You lost out on it, didn't you?

MR. JEREMIAH McANARNEY. Is that important, if your Honor please?

THE COURT. What is it?

MR. KATZMANN. I think it is vitally important.

THE COURT. Yes. I won't say it is important. That is for the jury to say. You may answer.

MR. JEREMIAH McANARNEY. He was arrested before the meeting was to be held.

MR. KATZMANN. I think that is quite apparent.

THE COURT. I think I ought to leave it for the jury for whatever the importance may be, if any. [1926] . . .

Were you afraid to attend that meeting yourself?—Afraid?

Yes.—Took a chance.

Were you going to go to it?—I don't know if I could go.

Did you intend to go?—If I had a chance, because I had to go to Italy in a hurry.

Did you intend to go to that meeting yourself?—If I have a chance I will go.

Were you going to have the chance?—I don't know.

Do you know what day you were going to Italy?—I was going to New York on Saturday.

On Saturday?—Yes.

Were you going to pass those five hundred circulars out to your Radical friends?—Yes.

And going to have them attend an open meeting?—Yes.

You weren't afraid to have them come, were you?—No, sir.

Is the real reason why you told so many falsehoods to me you were afraid of your Radical friends being turned up?—Sure.

Are those answers consistent? Do you understand what 'consistent' is?—Consistent to me.

MR. JEREMIAH McANARNEY. Isn't that for the jury to decide?

THE COURT. It seems to me he should go far,—I suppose you have in mind, are the answers consistent with that meeting that was to be held?

MR. KATZMANN. Yes.

THE COURT. But you did not put that. You simply asked, were they consistent? You did not make it consistent between what. I think the jurors better have a short recess now." [1927]

On redirect examination Sacco testified that he had told Mr. Katzmänn he could not remember the dates of his visits to Boston:

"[By Mr. Moore.] Mr. Sacco, in the questioning of yourself by Mr. Katzmänn at the police station in Brockton, with reference to whether or not you were working on April 15th, did you refer at that time to the matter of

passports?—Yes, at that time. If I told him I was out of the factory all day, that was for the reason that I went out to get my passport. I told him that I was out several days. Pardon me, several times,—regarding looking for my passport.

Well, were you, or did you, at that time, Mr. Sacco, give Mr. Katzmann a definite date as to when you were out?—No, sir, I did not. I could not remember.

Why didn't you give him a definite date?—Because I did not remember.

At any time during the month of April were you away from the factory all day other than the one date of April 15th?—No, sir. . . .

What did you state to Mr. Katzmann, to your best recollection, with reference to the matter of dates?—I did not give him any dates or day. I told him that I could not remember the dates." [1961]

He said he had not intended lying about working on April 15th [1964] and that he had suspected, on account of the questions asked by Stewart [1968], that he was charged with some matter involving his opinions [1967]. He learned first of Salsedo's death on the morning of May 4th. [1974]

GEORGE KELLEY, superintendent of the factory in which Sacco worked, testified that early in 1920 he told Sacco he had discovered that his activities as a radical were being investigated. [2004]

ROCCO DALESANDRO and PARDO MONTAGANO testified to a conversation with Sacco on May 3rd concerning the collection and disposition of the literature [1985 and 1990]. Montagano said it was he who had arranged for the hall in Brockton at which Vanzetti was to speak [1990]. There was testimony by MICHAEL COLOMBO to the effect that he had bundled up his books as the result of a talk with Dalesandro. [1988]

MRS. SACCO said she had heard her husband talk with Vanzetti on the afternoon of May 5th about gathering literature [2056] and had heard a conversation to the same effect with Boda and Orciani later that afternoon [2059]. She testified that after she heard of Sacco's arrest she burned some of the radical literature he had left in the house. [2061, 2062]

In rebuttal STEWART read to the jury some of the answers given to him by the defendants at the time of their arrest. Sacco had denied being a communist or an anarchist and when asked if he believed in the Government he had answered "Yes. Some things I like different" [2111]. Vanzetti, who had not been asked whether he was a communist, had answered the question about anarchy: "Well, I don't know what you call him. I am a little different." He had admitted also to having read anarchistic literature. [2112]

b. *The Summations and the Charge*

MR. MOORE gave this subject of consciousness of guilt considerable attention in his summation. He argued that if the facts were equally consistent with guilt or innocence the jury was bound to acquit [2141]; that the de-

fendants' statements to Stewart could not point to the South Braintree crime [2142]; that they had feared for their rights and liberties [2143] and that their suspicions had been inflamed by Stewart's questions about their beliefs [2144]. Moore also referred to the titles of the books found in Sacco's house and to the fact that on learning of the arrest Mrs. Sacco had burned other books. [2146]

MR. J. J. McANARNEY, in his summation, argued that the defendants' explanation of their purpose in getting the car had not been controverted.

"There are many human beings in this state, they have been in this court room, who know that is the truth, who know that Vanzetti went out to do that which he says he went to do, know that they arranged to get this car, know that just what he was doing was what you would expect him to do, to slip around and get hold of that literature and put it out of the way.

"Hasn't that been shown without any doubt? Wasn't it what they were arrested for? If the only thing was the fact these men had shot a man in Braintree, why these questions, 'Are you a socialist, are you an anarchist, are you this and are you that?' How would that prove the revolver or anything else?

"Gentlemen, I say that the case has floated along and has struck its level. Are you a socialist? Are you an anarchist? The trap was set right there at Bridgewater, to catch who? Gentlemen, this is no myth. You have got Coacci deported on the 16th day, taken in custody, taken to—on the train on the 17th and put aboard boat on the 18th. Isn't that something? Is it nothing that Boda was last seen there on the 20th and the chief of police talked to him? Note the question of the district attorney to Sacco, 'Do you mean to tell this jury that Boda, living in Bridgewater, came from Bridgewater down to Stoughton and went from Stoughton back to Bridgewater to get his Overland car?'

"Boda, on the evidence, was not there. Mrs. Coacci had moved out, and Boda wasn't seen there after the 20th day of April. The evidence is he was living somewhere in Boston, so that my brother he had forgotten that or did not have the information. I know he would not ask a question he didn't think was so, but you know that question was not fair to Sacco, because Boda was living in Boston at that time. The Coacci house was cleaned out. Boda beat the authorities to it. Get aboard and exit Boda; and we care not for Boda only he had that Overland car and we were going to use it that night.

"These men—no more popular thing was given to a district attorney to play a note up to a jury on than this case. No district attorney ever argued such a beautiful case.

"He can stand up to this rail and say to you gentlemen 'What have we been here for six weeks for, for two slackers, for two men who did not think enough of their country but what they would go to Mexico,—murderers, slackers, anarchists,' ring the changes, gentlemen, and you can play any tune you want to on that. And you have got to be very careful that you don't vibrate in unison with those words. They are fearful, they are potent, they are laden to the limit.

"But, gentlemen, they are not to be punished because they were slackers. [2161] It may be that in the mind of some men here, it may be you may feel that, that poor Sacco meant what he said when he said he worked with Irish-

men, with Germans and others, and he loved them but he did not believe in killing another. There are some men in this world who do not believe that. There are some men who do not feel that they have the right to take and kill.

"They may not understand our situation, and they may not understand the emergency that threatens the government, but they may have an honest conviction, and the history of the world has shown that there are men who are honest in that conviction, and if a man is honest in that conviction, it requires a good deal more courage for him to leave his family behind on his principles than it does to be drafted.

"Not one man will bear more for his country or who will stand back of this government more than I, but I want to deal fairly with a man who has not the point of view that I and you have been given, and I say again that men may have individual courage who will take that foolish position. They did take it. They are entitled to be condemned as hard as you want to condemn them for it, and also that they have this literature, and all of that, but does that prove, gentlemen, that they killed over in South Braintree? Take all of that, their simple, their sad story, and their peculiarity of mind. I say take it anyway you want to." [2162]

He pointed out that Connolly had said nothing more than that Sacco had put his hand under his overcoat and that Mrs. Johnson's testimony about being followed had been contradicted by her husband [2162-2164]. McAnarney laid the defendants' lies to their knowledge that "they were amenable to something" and pointed out that Mrs. Sacco had also lied and that no one would therefore accuse her of guilty consciousness [2164, 2165]. He argued that the prosecution had brought the issue, conscious guilt, into the case only because identification would not stand the test, and that on this issue itself they had Connolly alone on whom to rely.¹

MR. KATZMANN accused the defendants of having made up their explanation during the trial,² and based his statement both on counsels' failure to mention this explanation in their opening [2185] and on the time spent on the cross-examination of the Johnsons; this last point tending to show, he maintained, that the defendants had not told their own lawyers that they had been at the Johnson house. [2197]

He argued that the explanation offered by the defense would not stand because Vanzetti had returned from New York on April 29th, and while expecting raids on May 1st, had done nothing then either about getting the literature or about asking someone to keep it. He also asked why four men had been needed to get the car and why, being as frightened as they claimed, they had left literature in Sacco's house.

"Well, if that is all they were going to do, gentlemen, and if this mortal dread that made them utter falsehood after falsehood and deny up hill and down hill that they were there, was founded on apprehension of arrest on slackerdom, will you tell me why it was, gentlemen, that the four of them went down there and the defendant Sacco from whose house they went, who had this literature that on his wife's own story was of such character it was burned the day, the morning after his arrest and left these things—if

¹ See pp. 75-78.

² See pp. 82-84.

she had to burn the rest of them you can imagine the difference in character between those they dared produce in Court and those she burned—will you tell me why, under every instinct of self-preservation, Sacco and Vanzetti, who then had a week's notice, and the 1st of May had gone by when these raids were to be made—I am talking now about the 5th of May—Sacco and Vanzetti walked out of Sacco's house and left scores of books of such a nature that his wife burned them the next morning, and he says it was because he was afraid of the possession of that literature that he falsified.

"Gentlemen, can you reconcile that with truth? Can you possibly conceive of any human being so gone to humanitarian values that, fright[2199]ened out of his life when he was arrested that he was to be charged with having some Radical literature in his possession, he walked off and left his wife and baby with a load of books there that were of such a nature she destroyed them after his arrest, and never moved one of them." [2200]

He said that fear of deportation was absurd as a motivating cause, since Sacco had already in his possession at that time a passport for Italy [2200]. He contended the defendants denied following Mrs. Johnson because "they could not possibly explain that on the basis of literature or of their being slackers, a woman whom they did not know." [2201]

In discussing Connolly's testimony Mr. Katzmman argued that Vanzetti's testimony corroborated Connolly's, since the latter would not have told Vanzetti not to move unless he had attempted to do so. Mr. Katzmman claimed that the defendants had been planning to kill the officers and escape, and that this intention indicated consciousness of guilt of a crime of great seriousness:

"Consciousness of guilt! gentlemen. Well, if you were arrested for expectorating on the sidewalk in violation of some city ordinance and when arrested you had a gun in your pocket, would you say if you made an effort to draw that gun upon the officer that you consciously guilty of the minor offence of violating a health ordinance by spitting upon the sidewalk, or would you say, if you were going to go that far, if you were willing to go that far, if like Sacco you tried to pull that gun twice upon Spear or Connolly or upon whomever it was sought to make away with him, that you were conscious of guilt of a crime commensurate with the kind of action that you were about to take? Can you draw any logical conclusion save that?" [2206]

In his charge JUDGE THAYER said that conscious guilt depended on established facts; that if the defendants were consciously guilty only of being slackers and feared nothing more than deportation, then there was no element of conscious guilt in the case [2257]. He stated that the Commonwealth claimed the defendants had left the Johnson house because they had been suspicious of what Mrs. Johnson was doing. He charged the jury that they could not convict unless they found that the consciousness of guilt related to the murders.

"Now, then, the question you must determine is this: Did the defendants, in company with Orciani and Boda, leave the Johnson house because the automobile had no 1920 number plate on it or, because they were conscious

of or became suspicious of what Mrs. Johnson did in the Bartlett house? If they left because they had no 1920 number plates upon the automobile, then you may say there was no consciousness of guilt in consequence of their sudden departure, but if they left because they were consciously guilty of what was being done by Mrs. Johnson in the Bartlett house, then you may say that is evidence tending to prove consciousness of guilt on their part.

"But still, you must remember that such consciousness of guilt, if you find such consciousness of guilt, must relate to the murders of Berardelli and Parmenter and not to the fact that they and their friends were slackers and liable to be deported therefor or were even afraid that some kind of punishment might come to them." [2259]

He discussed Connolly's testimony and the denials of the defendants, saying that it was not enough that Connolly had thought the defendants were about to draw their guns. The question was whether the defendants had in fact intended to use the guns [2259-2260]. He charged the jury further that the false statements made by the defendants could be considered if their purpose had been to remove suspicion of the murders but not if there had been any other purpose.¹

"If, then, such statements were made for the purpose of deception in regard to the facts relating to the murders of Berardelli and Parmenter, then you may consider such statements, as I have said before, as evidence of consciousness of guilt against them. If they were not made for such purpose or if they were made for any purpose whatsoever other than the concealment of the facts relating to such murders, then you will give the evidence no further consideration whatsoever." [2262]

c. Subsequent Discussion

The Judge reviewed at length the matter of conscious guilt in his opinion of December 24th, 1921, pointing out that the radicalism of the defendants was introduced solely to meet the claim that their actions and lies had been due to guilty consciousness [5555-5560]. He referred to "two police officers" as having given testimony which tended to prove that Vanzetti reached for his hip pocket [5557]. (In point of fact it was Connolly only who had so testified.) Judge Thayer argued that the jury had the right to believe the police officers and to find that the consciousness of guilt thus evidenced did not relate to radicalism. [5559]

"The jury had just as much right to pass judgment on the relationship of this evidence to the murder of Parmenter and Berardelli as they did upon the question of radicalism. The evidence of radicalism having been introduced by these defendants, I am asked to set aside these verdicts because their own evidence created such a strong prejudice against them that it prevented a fair trial. Can I say that these verdicts were influenced by prejudice instead of the fact that the testimony of the defendants did not withstand the tests of truth? At the time of the arguments of these motions for new trials, it was said by counsel for the defendant that the jury was a 'very intelligent one,' and at that time nothing was advanced in argument against

¹ The charge is quoted at pages 94 to 100.

their honesty or integrity. The arguments of counsel went to the judgment of the jury solely because it returned verdicts of guilty. In other words because the jury returned verdicts of guilty those verdicts must have been the result of prejudice rather than sound judgment, reason and conscience. This contention is unsound. Am I to assume that the jury was actuated by prejudice without some evidence of that fact? . . . Because a defendant himself introduces evidence of radicalism it does not mean that his testimony from that moment must be stamped by the jury with the seal of truthfulness. A jury cannot be debarred the right of throwing the searchlight of careful investigation, consideration and study upon the testimony of a radical and neither should they be prevented nor discouraged from applying to him the usual tests that are applied to all witnesses with a view of ascertaining the truth." [5559]

In the opinion on the Gould motion already referred to, Judge Thayer argued that the jury could not be condemned for finding no connection between some of the falsehoods and radicalism, because Vanzetti had admitted that he himself could not do so:

"for the jury had a right to say if he could not state within nearly four times the market value of that revolver that he did not know it, and if he did not know its value, then that would be some evidence that he did not buy it, and if he did not buy it, that would be consistent with the contention of the Commonwealth, together with the other evidence, that it was taken from the body of Berardelli at the time of the shooting. Again, Vanzetti, having admitted in cross-examination that he could find no logical connection between some of the falsehoods and radicalism, ought a jury to be condemned if they were unable so to do?" [3517]

He argued that Sacco had been cross-examined in order to test the truthfulness of his statements regarding radicalism and to show there was no real connection between this radicalism and the falsehoods:

"Counsel were allowed to cross-examine the defendants, particularly Sacco, in regard to his relationship to and belief in radicalism and anarchy, his relationship to this country, to Italy and American institutions in order to test the truthfulness of his testimony, and not for any prejudicial purpose because he believed in radicalism.

"In other words, the defendants having introduced the subject of radicalism to show their fear of deportation or some other punishment because of the falsehood he had told, then the Commonwealth had a right to cross-examine for the purpose of showing that his or their beliefs, acts, conduct and the character of the literature they possessed were not of such a character or nature that would subject either of them to deportation or to any other punishment whatsoever; and if the Commonwealth did not succeed in showing this fact, it still had the right to show that there was no logical or reasonable connection between the falsehoods told and radicalism. It cannot be claimed that the district attorney brought out this subject first, because the defendants' case was overflowing with radicalism before Mr. Katzmann even began his cross-examination." [3523]

In Mr. Thompson's brief on the appeal he argued that the purpose of the cross-examination was not the purpose accepted by Judge Thayer, namely,

to test Sacco's credibility, but was really to excite the prejudice of the jury against the defendants because of their beliefs. [4068-4076]

The Supreme Judicial Court held that the questions were properly within the trial court's discretion:

"These questions as well as the questions relative to the effect on his wife of his possible arrest and deportation for participation in movements inimical to the government, were within the rule that a witness may be cross-examined in the discretion of the judge to test his accuracy, veracity or credibility, or to shake his credit by injuring his character, and for this purpose his way of life, his associations, his habits, his prejudices, his physical defects and infirmities, his mental idiosyncrasies, if they affect his capacity, his means of knowledge, powers of discernment, memory and description, may all be relevant. Steph. Ev. c. 16, art. 129. 1 Greenl. Ev. (16th ed.) § 446. Wigmore on Ev. (2d ed.) § 944. And the extended colloquy between the trial judge and counsel, more or less explanatory of this course of procedure, does not show as matter of law any abuse of the judge's discretion. *Commonwealth v. Savory*, 10 Cush. 535. *Commonwealth v. Curtis*, 97 Mass. 574, 579. *Commonwealth v. Clark*, 145 Mass. 251. *Jennings v. Rooney*, 183 Mass. 577.

"The argument is pressed that the purpose of the district attorney's questions obviously was not the purpose declared by him and accepted by the trial judge, namely, to affect the credibility of Sacco, but was to excite and intensify prejudice against him. But we must follow the record, and a careful reading of it does not sustain this contention." [4339]

The Supreme Judicial Court made no express reference to the subject of consciousness of guilt. Twice in its opinion it stated that Mrs. Johnson had telephoned the police on account of the actions of the defendants, once asserting that her suspicions had been aroused [4315, 4336]. These statements are, of course, misleading, because Mrs. Johnson actually went out to telephone in accordance with a prearranged plan, and before she had noticed the defendants at all.

The alleged motive for the cross-examination of Sacco was again attacked on the argument of the Medeiros motion. Mr. Thompson argued, on the basis of the affidavits of Weyand and Letherman, that Mr. Katzmänn had been informed before the trial by both Weiss and Weyand that the defendants were radicals, members of the Galleani gang [4377-4392]. The affidavits were made by former members of the Department of Justice.¹ They set forth that William J. West, Special Agent of the Department of Justice in charge of radical matters, had been in touch with Mr. Katzmänn about the case and had coöperated with him and furnished him with information concerning the radical activities of the defendants for use on cross-examination [4501-4506]. An affidavit was filed by Mr. Katzmänn which denied responsibility for a suggestion that had been made to spy on Sacco and his wife, but which said nothing whatever about his having received information with regard to Sacco's radical activities and nothing about his own relations with West. [4611, 4612]

¹ See Part 1, pp. 126-134.

In his opinion denying the Medeiros motion, Judge Thayer said that Mr. Katzmänn's purpose in cross-examining Sacco had not been to test his credibility but only to show that "there was no logical connection between their falsehoods and incriminating conduct on the one side and radicalism on the other" [4770]. Curiously, the Judge quoted two questions and answers as from this cross-examination [4771] which in fact exist nowhere at all in the record:

"Much severe criticism by counsel for the defendants was made of District Attorney Katzmänn because of a reply that he made to the Court when he said he wanted to go into this subject of radicalism in cross-examination for the purpose of testing the credibility of their claim. Severe criticism was made of him because he wanted to ascertain in cross-examination whether or not these men were radicals when he had already been informed by the agents of the Federal Department that they were radicals. This was not Mr. Katzmänn's purpose at all. It was not necessary for him to cross-examine these defendants for this purpose, because before his cross-examination began, the defendants, in direct-examination, told everything that they desired about their radical views and activities and their fear of punishment and deportation. Mr. Katzmänn cross-examined with one view in mind and that was, to show there was no logical connection between their falsehoods and incriminating conduct on the one side and radicalism on the other. In other words, the cross-examination by Mr. Katzmänn was carried on with a view of proving to that Jury that the evidence of their consciousness of guilt was more consistent with the [4770] murder of these two defendants than it was with radicalism.

"Let me give an illustration of just what is meant by Mr. Katzmänn's purpose in cross-examination, by taking one illustration in each case. Mr. Sacco said that he feared punishment, that he was afraid of deportation, that he did not want to go back to Italy, that he had told all these falsehoods because of this fear. Mr. Katzmänn, in his cross-examination, brought out all these facts and then he asked this question: 'Mr. Sacco, you say you feared deportation and that is why you told all these lies and why you did what you did?' and Mr. Sacco said 'Yes.' Then came the next question: 'Mr. Sacco, at the very time when you were telling these lies, you had already secured a passport for Italy on which you, your wife, and two children were to sail two days after the night of your arrest?' and the answer was 'Yes.' Mr. Katzmänn, on this same line, asked many other questions and forced Sacco, as well as Vanzetti, to admit that they could see no logical connection between the falsehoods told and radicalism." [4771]

The Supreme Judicial Court, on the second appeal, disposed of this subject by a mere reference to the decision on the first appeal which upheld the legality of this cross-examination. [4893]

Consciousness of guilt was also discussed by Judge Thayer in this Medeiros opinion. He said that when counsel brought up the matter of radicalism he had suggested that they confer with John W. McAnarney and that they had done so. He stated that all counsel had agreed it would be fatal to the defendants if the evidence of radicalism were not introduced [4768]. He claimed that the falsehoods and incriminating conduct

of the defendants had made this measure necessary, referring by the words falsehoods and incriminating conduct to the occurrences at the Johnson house, to the reaching for the guns, "and many other facts." [4769, 4770]

d. Before the Lowell Committee

At the hearings before the Lowell Committee, Mr. JOHN W. McANARNEY, brother of the two counsel for Vanzetti, testified regarding the conference at which it was decided the issue of radicalism should be brought into the trial. He said the two defendants were firmly convinced both that Salsedo had been thrown out of the window and that they had been arrested on account of their radicalism [4993]. He added that without the explanation of radicalism the defendants would have been liable to conviction although he stated also that he had not considered the case hopeless. [4992-4994]

"(By PRES. LOWELL) The object to put him on the stand was to give the explanation of radicalism?—So the facts might be put plainly before the jury. By no other theory could the actual facts be brought to the foreground other than the fact they explain the whole situation and accounted for their behavior and consistently so.

(By JUDGE GRANT) If they made no other defense, they were liable to be convicted?—Absolutely.

On the evidence that had been produced?—Yes. This was when the government had rested. It became an important part in the case. My brothers were strongly to have the men go on the stand and tell all the facts.

(By PRES. LOWELL) Suppose they had not been put on the stand at all, you think the result would practically have been inevitable?—That was the only evidence that I recall. Radicalism had not come into the trial at the time the government rested. [4993] . . .

(By PRES. LOWELL) Suppose that defense, that explanation of radicalism, had not been put in, did you regard the case as practically hopeless?—No, I wouldn't say that, I haven't read the testimony in all these years. Looking back at it now I remember saying this, to explain my attitude, I remember telling my brothers I wished to God I had the privilege of arguing the case, and my purpose in that was this. The inherent weakness was the character of the witnesses, the obvious quality of the testimony. I heard them one day. You may read this tomorrow but you can't get the same impression you would as I talk to you. I sat out there one day and I heard one witness, I can't give you his name. [4994] . . .

(By PRES. LOWELL) Then with that atmosphere you must have realized to bring in the question of their being radicals was liable to prejudice the jury against them?—These men were on trial for their lives. I believe it was the duty of my brothers to put them on the stand. Going on the stand he was confronted with this duty, and I put it to each of you three gentlemen. The man is going on the stand to testify; he is necessarily going to be asked about an important part of that case. Would you advise

him to tell the truth or refuse to answer or lie?

(By JUDGE GRANT) Didn't Judge Thayer acquiesce with that; didn't he point out the danger of that in conference with you?—I have tried Judge Grant to refresh my memory whether Judge Thayer spoke to me about it. I know he told my brothers to confer with me. I know he did speak in the corridor.

(By PRESIDENT LOWELL) Well they did confer with you?—They did.

Well you haven't quite answered my question. Of course, you would tell your witness to tell the truth, but at the same time you realize in this case the putting them on the stand and having them give an account of their radicalism was liable to prejudice the jury in regard to the popular feeling at the moment?—I realized it was liable to prejudice the jury as citizens and men but I did not suppose it would prejudice the jury in regard to the innocence or guilt of the men. Very often in a trial of a case an attorney is confronted with the situation, if this man tells the facts, he is damned in the community when he is acquitted of the crime by his confession to a greater crime. This confession that they were radicals, it was damning them in the minds of all Americans, of course, but I assume it should be handled rightly by the jury.

(By JUDGE GRANT) Why in that case should the conditions in the court room prejudice them? Why isn't that the same thing?—One was the men's firm belief, it may have been a poor intellectual belief; the men opposed to the government may be like Sacco and Vanzetti was, men who would not commit a physical act, and yet they might be arguing against the political situation. It would not contend to show they would go out and commit a horrible murder. What happened in the jurors' room and the presence of the guards, it was violence that the government was telling the jurors that was to be apprehended. On the other hand the disclosure they were making was the disclosure of their belief.

(By PRES. LOWELL) Disclosing an attitude of mind which explained and justified their carrying loaded weapons.—I doubt if the loaded weapons feature was as significant to my mind as the fact they were there and the misrepresentations they made to the officers. I candidly at this moment can tell you the extent the presence of revolvers operates on any mind. I have had a lot of experience with Italians and it is regrettable to admit, but it is a fact, that many of them carry revolvers." [4996]

MR. THOMAS MCANARNEY testified that he thought the lies the defendants told the District Attorney would have been fatal had they not brought in the explanation of radicalism [5057]. He was asked by President Lowell in a rather long question why all four men had had to go in the automobile to get the literature and said that he failed to get the drift of the question. There was discussion between President Lowell, Mr. Thompson and the witness which resulted in a statement of Thompson's to the effect that the defendants had wanted the control of the automobile for a day or two. [5058, 5059]

MR. KATZMANN admitted before the Lowell Committee that he had known perfectly well that Sacco was a radical [5040]. He said: "I cannot tell you how much I knew about Mr. Sacco's political or economic beliefs. I had no interest in them." [5041]

The report of the Committee said:

"The cross-examination by Mr. Katzmänn of the defendant Sacco on the subject of his political and social views seems at first unnecessarily harsh, and designed rather to prejudice the jury against him than for the legitimate purpose of testing the sincerity of his statements thereon; but it must be remembered that the position at that time was very different from what it is now. We have heard so much about the communistic or radical opinions of these two men that it is hard to put ourselves back into the position that they, and particularly Sacco, occupied at the time of the trial. There had been presented by the Government a certain amount of evidence of identification, and other circumstances tending to connect the prisoners with the murder, of such a character that—together with their being armed to the teeth and the falsehoods they stated when arrested—would in the case of New England Yankees, almost certainly have resulted in a verdict of murder in the first degree,—a result which the evidence for the alibis was not likely to overcome. Under these circumstances it seemed necessary to the defendants' counsel to meet the inferences to be drawn from these falsehoods by attributing them to a cause other than consciousness of guilt of the South Braintree murder.

"From the statements before the Committee by the Judge and by one of the counsel for the defendants it appears that Judge Thayer suggested, out of the presence of the jury, that the counsel [5378j] should think seriously before introducing evidence of radicalism which was liable to prejudice the jury; but at that stage of the case the counsel thought the danger of conviction so great that they put Sacco and Vanzetti on the stand to explain that their behavior at and after their arrest was due to fear for themselves or their friends of deportation or prosecution on account of their radical ideas, conduct and associations, and not to consciousness of guilt of the murder at South Braintree. We have already remarked that at the present moment their views on these subjects are well known, but they were not so clear at the time. Save for his association with Vanzetti, and his own word on direct-examination, there was, up to the time of his cross-examination, in the case of Sacco no certainty that he entertained any such sentiments. The United States authorities, who were hunting for Reds, had found nothing that would justify deportation or other proceedings against either of these men. Except the call for a meeting found in his pocket, there was no evidence that Sacco had taken a prominent part in public meetings, or belonged to any societies of that character; and although wholesale arrests of Reds—fortunately stopped by the decision of Judge Anderson of the United States Circuit Court—had recently been made in Southeastern Massachusetts, these men had not been among those arrested. At that time of abnormal fear and credulity on the subject little evidence was required to prove that anyone was a dangerous radical. Harmless professors and students in our colleges were accused of dangerous opinions, and it was almost inevitable that anyone who declared himself a radical, possessed of in-

flammatory literature, would be instantly believed. For these reasons Mr. Katzmann was justified in subjecting Mr. Sacco to a rigorous cross-examination to determine whether his profession that he and his friends were radicals liable to deportation was true, or was merely assumed for the purpose of the defense. The exceptions taken to his questions were not sustained by the Supreme Court." [5378k]

There is nowhere evidence that Sacco was less known to the prosecution as a radical than Vanzetti. On the Medeiros motion Judge Thayer expressly disavowed any attempt to justify Sacco's cross-examination on such grounds. It is remarkable, therefore, to find the Lowell Committee so at variance with the otherwise known facts.

No reference was made to the actions of the defendants at the Johnson house but it was stated that some of their lies had had no relation to their being radicals "but did have a very close connection with the crime." Particular reference was made to Sacco's statement that he worked all day on April 15th. [5378x]

The Lowell Committee discussed the armed condition of the defendants, saying that it could "hardly be common among people whose views are pacifist." Sacco's claim that he had forgotten about having taken his pistol along seemed incredible to the Committee. [5378x,y]

Finally the report argued that Vanzetti virtually confirmed Connolly's statement that he tried to draw his gun because his own testimony was "an admission that the officer thought he was making a movement towards his pistol." It was suggested, however, that Vanzetti's acts might have indicated guilty consciousness of the Bridgewater crime only. [5378y]

The Governor, in his report said:

"As to the first question, complaint has been made that the defendants were prosecuted and convicted because they were anarchists. As a matter of fact, the issue of anarchy was brought in by them as an explanation of their suspicious conduct. Their counsel, against the advice of Judge Thayer, decided to attribute their actions and conduct to the fact that they were anarchists, suggesting that they were armed to protect themselves, that they were about to start out, at ten o'clock at night, to collect radical [5378d] literature, and that the reason they lied was to save their friends." [5378e]

e. *Summary*

The prosecution's theory can be stated briefly as this: The defendants and their associates at the Johnson house had been impelled to leave hurriedly because their suspicions had been aroused when Mrs. Johnson telephoned the police; when approached by Connolly in the car and again on the way to the police station, they had intended drawing their guns in order, if necessary, to kill the policeman and make their escape, and had made some motions to that end; and when arrested they had told lies to divert suspicion from their participation in the murders at South Braintree.

It is apparent that the first claim of the prosecution destroys the second. In other words, the claim that the suspicions of the men were aroused at the Johnson house is entirely inconsistent with the claim that they made ineffectual attempts to draw their pistols. It is absolutely inconceivable that a bandit such as the one who killed Berardelli, should, his suspicions having been aroused, allow himself and an armed confederate to be trapped by one policeman in a street car, without making a move, and then in an automobile surrounded by three policemen, make an ineffectual move under his overcoat. On the street car both defendants were armed. In the automobile Sacco alone was armed. It is quite clear that if Connolly's story is based on fact, the minds of the defendants must have been entirely unprepared for arrest.

It will be noted that the Lowell Committee did not in any way refer to the claim that the suspicions of the defendants had been aroused. The explanation of radicalism would have disposed completely of the episode at Johnson's. Mr. Katzmann's argument to the contrary is devoid of logic. The mere fact that the defendants were unknown to Mrs. Johnson has no bearing on the question, since Boda was known, at least to Mr. Johnson, and Boda had lived with Coacci who had been deported. For the defendants the inference was only too obvious. The claim that their suspicions were aroused at the Johnson house is entirely consistent with their explanation of radicalism. On the other hand, if the defendants were the bandits they were supposed to be, their acts subsequent to their arrest were clearly inconsistent with the fact of having had their suspicions aroused at the Johnson house.

It is quite clear that the explanation on the score of radicalism does not account for the way the defendants acted upon arrest, if Connolly's testimony is to be believed; and, as the Lowell Committee states, the defense raised no such issue. The defense denied the events to which Connolly testified and argued that no inferences such as were attempted could be drawn. It should be noted that the most that Connolly said was, that Vanzetti put his hand in his hip pocket and that Sacco put his hand under his overcoat. There was no express testimony that either defendant attempted to draw a weapon, nor did Connolly ever say directly that he thought they had intended doing so. Judge Thayer properly charged the jury that it was not enough for them to find that Connolly had thought defendants were going to draw their guns, but that they had also to find intent to do so on the defendants' part. This distinction the Lowell Committee seems to ignore.

It stretches the imagination to suppose that two fully armed bandits should so easily have let themselves be arrested by a single policeman. That one of them might unsuccessfully attempt to draw his pistol and be detected is, of course, possible. But that the other should do nothing while only one officer was present and should then attempt to draw a gun in the presence of three, his companion having meanwhile been disarmed, is hardly credible. In view both of the narrow testimony Con-

nolly actually gave, and of his failure to present any such evidence as this at the Plymouth trial for the Bridgewater crime, is it not probable that any movements the defendants may have made had no connection with their guns and, therefore, could form no basis for an inference of guilty consciousness?

The third state of facts relied upon by the prosecution is much more formidable. Indeed, it constitutes the one really dubious point in the defendants' case. It is impossible to reconcile all their falsehoods with the explanation of radicalism. That fact, however, does not necessarily mean guilty consciousness of murder.

The falsehoods the defendants told fall into three categories: Those which have logical relation to the men's radicalism, those which might have relation to the murders, and those which have logical relation neither to the defense of radicalism nor to the charge of murder. In the first category there is a large number; in the other two, only a few statements made by each defendant. The Lowell Committee has stressed the second variety of falsehoods which might bear relation to the murders, but ignored the third, those which relate to neither the charge nor to radicalism; and the existence of those of this last variety may well throw a light of explanation upon the others. In this light it is not improbable that the apparent relation of some of these lies to the South Braintree murders may very well prove accidental only.

Before reviewing with some particularity these different falsehoods it should be remembered that whatever may at any time have been the opinion of the prosecution, it was generally conceded long before the Lowell hearings that the defendants were, in fact, radicals. Their claim had a solid basis; logically it was pertinent; and it was not, as Katzmman argued in his summation, an invention created to meet the exigencies of the case.

Let us consider the nature of these lies. To Stewart the defendants denied their activities, gave a false excuse for their movements and denied knowledge of Boda and other radical friends. Only one falsehood either defendant told on that occasion is unexplained by the defense of radicalism: Sacco's statement that he had bought his gun in Boston [849], when in fact it had been bought in Milford [1895]. No consciousness of guilt relative to murder could be attributed to him for this misstatement, since the place of purchase of the gun is clearly immaterial to any possible crime.

When questioned by Mr. Katzmman Vanzetti made two statements which have an apparent connection with the murder. He said he had owned his revolver a long time and had bought it in Boston, when in fact he had bought it a few months before the murders from Falzini [1748, 1749]. He said also that he had given a false name at the time of its purchase [1797]. He would neither admit nor deny that he had told Katzmman the gun cost \$19.00 [1750] but his actual making of this statement was never proved. Judge Thayer, however, in several opinions

assumed the making of the statement as a fact. At the trial Vanzetti admitted that the cost of the gun had had nothing to do with the literature, but claimed that the rest of his statement about the gun had had such connection [1751]. He testified also that to have told the truth about the gun would have brought Falzini to the attention of the police. [1799]

The falsehoods relating to the gun may, of course, have had connection with the murders in that Vanzetti may have hoped through them to allay suspicion, conveying the impression that he had owned the weapon for a long time. On the other hand they may have constituted merely an attempt to prevent the police from finding out about Falzini and Orciani. The matter is not one about which a conclusive inference can be drawn.

Vanzetti's other falsehood of the same nature as this one was the statement made to Katzmann that he did not know where he had been on the Thursday before Monday, April 19th [2117]. That Thursday, of course, was April 15th, but at the time of the hearing at Brockton Vanzetti's attention had not been called either to the date or to the Braintree crime. At the trial he did not remember whether or not he had given the answer that he did not know where he had been and explained that he had not remembered, when questioned by Mr. Katzmann, since the 15th was a day "common to every other day to me. I peddled fish" [1802, 1803]. Surely these answers indicate no consciousness of guilt. Here was no attempt to account falsely for his actions on the fatal day but rather that very failure to grasp the importance of the date which is to be expected of an innocent man.

Vanzetti told certain other lies which may be described as indifferent in character. He misstated, for instance, the date on which he left Plymouth [1754] and the number of cartridges in the pistol [1798]. he claimed he had bought a new box of cartridges and shot some of them [1799, 1800]. Of course, as he himself admitted, the matter of the new box of cartridges had nothing to do with exposing his friends. Yet, on the other hand, the only possible connection these falsehoods could have had with the murder was that same conveying of the impression already suggested in connection with the revolver itself, that Vanzetti had had it a long time and had used it. In point of fact, the falsehoods proved the contrary, because a mere inspection of the revolver in the possession of the police disclosed that the answers were untrue. Would not a guilty owner of Berardelli's weapon have examined it so that he might be prepared for some kind of story, in the event it were found upon him? Would he have remained ignorant of the number of the gun's cartridges and of their character as well? Vanzetti's patent ignorance on this subject is much more consistent with the purchase, a few months before, of a second-hand gun, which, evidently, he never used. It may very well be that, having lied about the purchase of the gun in order not to disclose the names of his friends, he thought he could make his lie more plausible by claiming he had used the gun, and possibly that it would all seem more natural if he said he had bought the gun in a store and with it a

box of cartridges. Some such fantasy may have prompted these lies. It seems almost impossible that guilty consciousness would have resulted in such reckless, unplanned misstatements.

Sacco also lied to Mr. Katzmann about the purchase of the cartridges found on him, saying he had bought a new box, he did not know where, when in fact he had got them in Boston, in a box already used [1900]. He, too, admitted that these falsehoods had no relation to the disclosure of the names of his friends [1901]. His statements, like Vanzetti's similar ones, can hardly be charged to consciousness of guilt. There seems no conceivable reason why he should have falsified about the cartridges.

He denied, further, that he had ever been in Orciani's house [1919]. In view of the prosecution's constant disclaimer that Orciani had had connection with the crime and the fact that the latter was left at liberty even during the trial, it is impossible to connect this particular false statement with consciousness of guilt.

A careful reading of Sacco's testimony shows only one lie which bears logical relation only to the crime, his testimony regarding his whereabouts on April 15th [2118]. This testimony is not quite so simple as the Lowell Committee's report indicates. It shows uncertainty about his actions on Sacco's part, although not the degree of uncertainty which he thought at the trial he had previously expressed.

The question presents itself, as the Lowell Committee states, why should Sacco have hesitated to tell Mr. Katzmann on May 6th that he had been at the consul's office on April 15th? It should be noted in this connection, however, that neither at Brockton nor at the trial was Sacco able to fix the date of his earlier visit to the consul [1955, 1959]. It is also worth bearing in mind that Mr. Katzmann never mentioned the date in his questioning of Sacco, but referred merely to the day before the defendant read in the papers about the South Braintree murders. On the other hand, Sacco made the statement at Brockton that he thought the only full day he had not worked was April 5th.

Little can be said in further amplification of this situation. If Sacco was guilty it is possible he thought his absence from the factory on the 15th would not be definitely ascertainable. The explanation that he was unable to remember the date, April 15th, is not so entirely incredible as, in the absence of other evidence sufficiently indicative of guilt, to warrant disbelief in his innocence.

Before finally leaving the topic, reference should be made to Mr. Katzmann's argument directed against the explanation of radicalism, his contention that, although the defendants had expected raids on May 1st, they waited until May 5th before doing anything about hiding the literature [2198-2200]. Superficially, this is a powerful argument. It should, however, be borne in mind that Sacco and Vanzetti were workmen to whom the task of gathering from scattered places and then secret-ing a large quantity of literature must have presented formidable difficulties. To begin with, they needed a vehicle. The suggestion that Or-

ciani's side car could have been used may be dismissed, as no large quantity of literature could have been carried in it, especially since the side car would have had to be occupied by some one needed to assist the driver. Although the defendants knew Boda had an automobile, Boda was apparently not easy to locate, for he had moved from the Coacci house when Coacci was deported on April 19th. Vanzetti did not return to Plymouth until the 29th and did not see his friends in Boston at once. It is not surprising, then, that it took him a few days to get in touch with the other men. Clearly it was impossible to act before May 1st. When on that day nothing serious happened, it is presumable, too, that the need for haste seemed not so pressing as before. The news of Salsedo's death undoubtedly, when it came, occasioned increased activity.

Mr. Katzmann's query as to why it took four men to go for the car [2199] was echoed by President Lowell at the hearings, without counsel's having at that time made any really satisfactory explanation [5058-5059]. Sacco himself, it seems, gave a very clear answer to this question. He testified it had been their intention that he and Orciani go to Brockton to tell their friends to get the literature ready, and that Vanzetti and Boda look for Pappi, from whom they were to get certain information before proceeding to Plymouth, where Vanzetti was to have looked for some one who would take the literature. Sacco added that they had planned, if they found some one to accept the literature and had still time over to try that night to begin collecting some of it [1847, 1857]. This story seems a consistent and plausible explanation of the whole matter. It is not unlikely that Sacco and Vanzetti knew more about the literature than the other men did and that Boda and Orciani were used more or less as chauffeurs only. In any case there seems no reason to doubt the essential purpose of the visit to the Johnson house, nor was any other purpose ever suggested by the prosecution.

VI

THE ALIBIS OF THE DEFENDANTS

- I. Sacco's Alibi.
 - a. Testimony at the Trial Relating to Sacco's Alibi.
 1. Sacco—2. Ricci—3. Monello—4. Guadagni—5. Williams—6. Bosco—7. Andrower—8. Dentamore—9. Affe—10. Hayes—11. Rose Sacco, Iacovelli, Kelley, Maertens.
 - b. Discussion by Counsel and the Judge.
 - c. Before Governor Fuller and the Lowell Committee.
- II. Vanzetti's Alibi.
 - a. Testimony at the Trial.
 1. Vanzetti—2. Carbone—3. Rosen—4. Mrs. Brini—5. Miss Brini—6. Guidobone—7. Corl—8. Jesse.
 - b. Discussion by Counsel and the Judge.
 - c. Before the Lowell Committee.
- III. Summary.

I. *Sacco's Alibi*

Sacco's claim was that on Thursday April 15th, 1920, the day of the murders, he spent the entire day in Boston and so could not have been in South Braintree. Testifying in his own behalf, he outlined his movements during that day from the time he took a train for Boston from Stoughton at about nine in the morning until his return by one which left Boston at about 4:12 in the afternoon. He told where he had lunched, related a visit to the Italian Consulate at about two o'clock to get a passport, and said he had spent some time at around three at a coffee house. In support of his own testimony he produced Ricci, who had seen him at the station in the morning; Monello, who talked with him on the street in Boston; Guadagni,¹ who lunched with him and later saw him in the coffee house; Williams and Bosco, who met him while at lunch; Andrower, who, in a deposition, fixed the visit to the consul's office, in which he had at that time been a clerk; Dentamore, who talked with him in the coffee house; and Affe, who met him near four o'clock and received payment for some groceries he had sold the defendant. On the train back to Stoughton Sacco said he had seen a certain man seated in one part of the car. He picked this man out in the courtroom during the trial. The man, a surveyor named Hayes, confirmed his presence as described by Sacco, but said he himself had not noticed Sacco in the car.

¹ In some places given as: Guadenagi.

The prosecution did not dispute Sacco's visit to Boston, but claimed it had taken place on some other day and that the witnesses who testified for him had no basis for fixing the exact date when they had seen him there. Emphasis was placed upon Sacco's statement at the time of his arrest, that he had been working on Thursday, the day before he had read in the papers of the South Braintree murders. The prosecution never claimed that Sacco might have been in Boston part of the day and reached South Braintree, only about twelve miles away, in time to take part in the murders.

Before the Lowell Committee Guadagni and Bosco were examined at the instance of President Lowell to test their statements, made at the trial, that they had fixed the date of Sacco's visit to Boston by a dinner given on the 15th of April to an editor of the *Boston Transcript*, Williams (not the man named Williams who testified for Sacco). Mr. Lowell believed he had ascertained that this dinner had not taken place until May; and he confronted the witnesses with the results of his investigation to that effect. It turned out that Lowell was mistaken and the witnesses correct as to the date of the dinner.

a. Testimony at the Trial

1. Sacco, testifying on his own behalf, stated that after the receipt of a letter advising him of his mother's death he had gone to Boston "the middle or last of March" to obtain information about his passport and that on April 15th he had gone there to get it. He left Stoughton, he said, on the 8:56 train and on arriving at the South Station in Boston walked to the North End. There, in Prince Street, he bought a newspaper, *La Notizia* [1823]. Fifteen minutes later, on Hanover Street, he met and talked with Angelo Monello:

"We walked until Washington Street, and go back again, so I stopped in the stores, and been looking at a straw hat, some suits,—a price, you know. Then I go back. I have my mind to go in the afternoon and get my passport. I say probably I go to get my dinner first, so I have a little time and I go there, so I went over to Boni's restaurant." [1824]

Outside Boni's restaurant, he met Professor Guadagni. He had lunch with Guadagni there, remaining until about 1:20. While at lunch he met Williams and Bosco there. After lunch he went to the Consulate, arriving at about two o'clock. [1824]

There he consulted some one inside the railing:

"I said, 'I like to get my passport for my whole family.' He asked me,—he said, 'You bring the picture?' I said, 'Yes,' so I gave it to him, sec. a big picture. He says, 'Well, I am sorry. This picture is too big.' 'Well,' I says, 'can you cut, and make him small?' 'No,' he said, 'the picture we cannot use, because it goes too big,' I says, 'Can you cut?' He says, 'No, no use, because

got to make a photograph just for the purpose for the passport, small, very small,—so I did." [1825]

After leaving the Consulate he went to a coffee house near Boni's restaurant, where he arrived a little before three and remained twenty minutes. He saw Guadagni again and met Professor Dentamore. Having left the coffee house he bought some groceries in a nearby store [1825]. At some time in the afternoon he met a man named Affe and paid him fifteen dollars. Taking the train back to Stoughton at about 4:12 he walked home and arrived there at about six o'clock. [1826]

On cross-examination by Mr. Katzmman Sacco said he did not remember just when he had last not worked before April 15th [1905] nor the exact date on which he had first gone to the Consul's office [1935], but that he thought this visit had taken place during the latter part of March [1936]. He said he had been told a photograph was necessary in order to obtain a passport but had not been told its size. [1939]

He thought the letter about his mother's death had arrived on March 23d or 24th; he said he had given it to his lawyers [1933, 1934]. This letter was not put in evidence and there is some confusion in the record as to what became of it. [1966, 1969, 1970]

Sacco was questioned at some length about the exact time of his various movements on the 15th:

"Why didn't you go up to the consul's office in the morning and take the noon train out?—Well, I think to pass all day when I been in Boston. I think better stay here. I have been working all the time. I will stay, take all day if I have a chance to stay it, because I got a pass to take all day off because they have enough work. the fellows after me working all day long, and if I was out just the same.

Whatever the reason was that you did not get your passport in the morning, did you tell George Kelley the next morning that there was such a crowd in there you could not get your passport and the place closed and you missed the noon train for that reason? Did you tell that to George Kelley?—Yes, I did.

That was another falsehood, wasn't it?—That was an excuse.

It was a falsehood, wasn't it?—Yes.

It was a falsehood to the man that had trusted you, or his father trusted you, with watching his building. That is right, isn't it?—Yes, but the man in the factory did not loaf." [1942]

He could not remember whether the first time he went to the consul's office was on April 8th or the last of March, but he did remember that the second time was on April 15th [1943]. He admitted having read about the murder on the day after it happened and recalled that he had said so to Mr. Katzmman at Brockton [1946]. He did not remember having stated he was sure he had worked on the day before he read of the murder [1947], although he admitted he probably had said so. [1948]

A transcript of the Brockton statement, later introduced in evidence, showed he had said he took a day off, either April 5th, 8th or 10th, "I can't say for sure" [2117], and that this was the only single day he had taken off and that the day before he read of the murder he worked, "but I don't remember for sure if I stayed out half a day . . . I think I worked Thursday":

The statement Sacco made at Brockton is quoted in full in the preceding chapter (page 454).

He admitted on cross-examination at the trial that if he had said at Brockton he worked on the 15th it was a lie, which he told "because I was not sure" and that he had not said then that he was not sure, because "I could not remember exactly." He finally said: "There was not interest to me very close to find out the date I have been out." [1948]

He said that at the time of his arrest he had not realized he was being questioned about any particular crime [1945] but he admitted that about thirty people had been to the jail to look him over [1947], that he had been asked about Berardelli, and that he had known that Katzmänn was talking about the Braintree murder [1949]. The next day he asked for the interpreter and said he had told Mr. Katzmänn at Brockton that he was not sure whether he had been working on the 15th [1950]. Asked again about his Brockton statement he said: "I did not tell you a lie. I did not tell it in bad faith" [1951]. The matter was gone into over and over again on cross-examination. [1945-1961]

He was asked when the smaller pictures, later used on the passport, had been taken, and said it was after April 15th at Stoughton; but he could not give the name of the photographer. [1934]

On redirect examination by Mr. Moore he said he had not given Mr. Katzmänn, when asked at Brockton, any date as to when he was away all day, because he had been unable to remember [1961]; but that he had since checked the matter, "because there is a criminal action depending over my shoulders and I remember. I did go over the dates" [1962]. He said that at the time of his talk with Katzmänn he thought he was charged with some matter involving his opinions "because I was active in the movement of labor work and because I was a slacker." [1967]

During the trial Sacco had called Mr. McAnarney's attention to a man who was seated in the front row [1977]. He said he had seen him before but did not know his name [1978]. After the man (James Matthews Hayes) had testified, and had left the court room, Sacco was examined through the interpreter, Mr. Ross, as follows:

"Mr. Sacco, where did you see this man, [Mr. Hayes]?—I remember that I might have seen him in the— [the witness talks to the interpreter] I remember that I have seen him the 15th day of April in Boston.

Well, where did you see him?—I saw him on the train coming home to my house." [2021]

The attention of the interpreter was called to his use of the word

"might" by Mr. McAnarney who said "The witness did not use that." After further conversation between the witness and the interpreter the latter said Sacco's expression was "that I saw him in Boston." Sacco was then asked if he meant Boston or the train and answered: "On the train." [2021].

In cross-examination by Mr. Katzmänn, Sacco said that on the way back from Boston he had sat in the middle of the car next to the aisle on the right hand side, and that Hayes had sat across the aisle on his left. He did not remember the man who sat on his right, next him; this man had not gotten off at Stoughton [2022]. He remembered Hayes because Hayes had gotten off at the same place as he, "and I noticed his face and I remember faces"; he did not remember any other person who got off at Stoughton that day. [2023]

2. DOMINICK RICCI, a carpenter of Needham, who had known Sacco for two years, was working at a house in Stoughton on April 15th. On the morning of that day, between 7:15 and 7:40, he saw Sacco on the platform station at Stoughton and there had a conversation with him about a passport [1679]. He did not see him take the train, for he, himself, left first [1680]. He testified that he met Sacco again the following morning at around 7:15 at Kelley's shoe factory and talked with him about the South Braintree crime. [1681]

On cross-examination the witness stated he had been working on this house on April 16th, 17th and 18th. Mr. Katzmänn did not call to the witness' attention the fact that April 18th happened to be a Sunday, but asked him whether he had worked on April 25th, on May 2nd, on May 9th, on May 16th, and so on in a long string down to the very end of the year. Ricci said Yes, that he had worked, in answer to each question asked. At the conclusion of the series of questions Mr. Katzmänn said: "I have got to the end of my calendar. You worked every Sunday, didn't you, from then on? That is all." [1683]

3. ANGELO MONELLO, a Roxbury contractor, who had known Sacco a few months, saw him on April 15th on Hanover Street, East Boston, at about eleven o'clock.

"How do you fix it it was the 15th of April last year you met him at Hanover Street?—How I fix it?

Yes.—Of course, you know the next Sunday, April 18th, was a play by a great artist from New York. His name is Mimi Aguglia.

What nationality, do you say?—Italian. [1668]

An Italian artist?—Yes. One of the greatest artists of the world.

And you were going to say where the play was.—The play at Tremont Theatre, 'Madame X.'

Is that the name of the play?—Yes.

MR. KATZMANN. 'Madame X.'

Did you go to the play?—Yes.

Did you talk with Sacco about that play?—Yes, I just—

MR. KATZMANN. One moment. One moment.

THE COURT. Did you have any conversation with him about the play?

THE WITNESS. Yes." [1669]

On cross-examination Monello was unable to name any one else with whom he had talked about this play on any one of a large number of days. On redirect-examination he said he had had a talk with Sacco on that occasion about a passport. [1670]

4. FELICE GUADAGNI,¹ a Boston journalist and professor of literature who had first met Sacco two years earlier, saw him on April 15th at Boni's restaurant at about 11:30 and ate lunch with him there. Guadagni remembered that Williams had come in; but he recalled the name of no one else in the place except Bosco [1991]. He conversed with Sacco on this occasion about the latter's proposed trip to Italy. At about 1:30 he left the defendant [1992], seeing him later at about three o'clock at Gior-dano's coffee house. Asked how he fixed the date:

"—I first recollect that it was the 15th, because in that day I had some discussion about a banquet which was given to Mr. Williams, the editor of the Boston Transcript, and I had some discussion about that banquet with Bosco first and Professor Dentamore afterwards in the coffee house. I was invited to that banquet.

When was the banquet to be?—The night of the 15th.

This man you say is the editor of the Transcript?—Yes, and I was speaking about that banquet." [1993]

It appeared from the testimony of another witness that the banquet referred to by Guadagni was given in honor of the editor of the *Transcript* because a decoration had been awarded him by the King of Italy. [2025]

On cross-examination Guadagni testified that he was a member of the Defense Committee and that after Sacco's arrest he had shown Andrower Sacco's photograph [1995]. He could not fix the dates of any other occasions on which he had met Sacco [1997]. He had not attended the banquet to Williams and could not remember when he had received the invitation. This was the only banquet, he said, to which he had ever been invited. [1998]

5. JOHN D. WILLIAMS, an advertising agent for foreign language newspapers, saw Sacco in Boni's restaurant on April 15th between 1:15 and 1:30 with Professor Guadagni, and stayed with the two men at the same table [1645]. He fixed this date partly by the advertising he took on that day [1646-7] and partly by a treatment he had had from Dr. Gibbs [1647]. His attention had first been called to the date by Felicani shortly after Sacco's arrest. [1649]

On cross-examination by Mr. Katzmann, Williams was unable to remember the dates of other visits to Dr. Gibbs, except that he thought he

¹ Or Guadenagi.

had gone there once a week on the average during the period in question [1652-9]. He was unable to remember any advertisements he had obtained on April 14th [1652] or any other occasions on which he had met Guadagni. [1654]

On redirect-examination he gave the following explanation of his fixing the date:

"—That order there ran on the dates, 17th, 18th, and 19th, and it would be secured for running the latter part of the week, and Sunday, Monday, and the fact that Thursday was the day regularly on which I went in the North End, and the fact I secured this order and the fact I met this young man down there, and the fact that he was said to be going for his passports; all of those things brought sequence of events back to me, and I recalled the incident very easily.

Was that order taken on the 15th?—Yes, sir." [1655]

DR. HOWARD A. GIBBS fixed the date of his only treatment of Williams in April as the 15th. On cross-examination he gave the dates of other visits and testified that Williams had seen the records some months before the trial. [1661-1662]

6. ALBERT BOSCO, one of the editors of *La Notizia*, met Sacco for the second time in their acquaintance in Boni's restaurant, with Guadagni, on the 15th [1662]. Mention was made of Sacco's trip to Italy and of his going to the Consulate [1663]. Asked how he was able to fix the date:

"—Well, from conversation that I had with Mr. Guadagni that we were giving a banquet to the director of . . . the Boston Transcript. . . .

When was that banquet held?—The evening of the 15th.

Well, how do you know that it was the 15th day of April that you saw Sacco?—When I saw the picture in the paper and Mr. Guadagni spoke to me about it, I went and looked back to the paper and I discovered that that was the evening of the banquet." [1664]

On cross-examination Bosco said that Guadagni had been invited to the banquet but he himself had not. An attempt was made to connect Bosco with the Defense Committee which met in the same building in which *La Notizia* had its offices [1664]. He knew nothing at all, however, about the Committee [1665] except that Guadagni was its Treasurer. [1666]

7. The deposition of GIUSEPPE ANDROWER, which had been taken in Rome, was read to the jury [1628]. For six years prior to April, 1920, the witness had been an employee of the Italian Consulate in Boston, charged with giving information in regard to passports [2266a]. He testified that on Thursday, April 15th, 1920, at about 2:00 or 2:15 P. M., Sacco had presented a photograph which the witness told him was too large to be used; he also stated that earlier in the month Sacco had come to him for information:

“—Early in April Mr. Sacco came to the Royal Italian Consulate for information how to get a passport for Italy. I gave him the information and told him that he should bring two photographs, one to be attached to the passport and the other for the records of the office. He then left and on April 15th, 1920, as I have stated before, he returned with a photograph the same as exhibit ‘B.’ I told him that this photograph was too large for use on a foglio di via or an Italian passport. He left saying that he would return with smaller photographs but I never saw him again.

If you shall have stated that you saw said photograph marked ‘B’ on April 15, 1920, please state how, and in what manner and why you are able, if you are able, to identify the date when you first saw said photograph marked ‘B.’—April 15th, 1920, was a very quiet day in the Royal Italian Consulate and since such a large photograph had never been before presented for use on a passport I took it in and showed it to the Secretary of the Consulate. We laughed and talked over the incident. I remember observing the date in the office of the Secretary on a large pad calendar while we were discussing the photograph. The hour was around two or a quarter after two as I remember about a half an hour later I locked the door of the office for the day.

If you shall have answered that you saw the photograph referred to, marked ‘B’ on the 15th day of April 1920, please state fully how you are able to fix said date, that is, give any fact or circumstances that enables you to fix the date.—This day made a special impression upon me as there was much less business than on the previous and following days. There were only about thirty or forty people in the office applying for passports that day and we usually had about two hundred. [2266c] . . .

—Mr. Sacco objected to going to the expense of having other photographs made and asked if I could not cut the pictures down to suit the forms. I told him this was not possible because the space covered by the persons in the group was too large for use. He then left without any further discussion in the matter.” [2266d]

Andrower said that Guadagni had shown him Sacco’s picture and recalled the occurrence to his attention [2266d] evidently before May 22d, 1920, when he returned to Italy. He said there was no doubt or uncertainty in his mind as to either the date or the hour of Sacco’s visit. [2266f] The Secretary of the Consulate did not testify.

8. ANTONIO DENTAMORE, foreign exchange man in the Haymarket National Bank, who, in 1920, had been editor of *La Notizia*, was introduced to Sacco by Guadagni on April 15th at about a quarter to three in the afternoon at Giordani’s coffee house. During this twenty minute conversation with Sacco the passport and the Consul’s office were mentioned [2024]. Dentamore fixed the date:

“I know because that day I went to the banquet in honor of Editor Williams of the Boston Transcript . . . at the Italian Friars Convent in the North End . . . about noontime.” [2025]

On cross-examination Dentamore stated he had had an argument with Guadagni about the banquet a few minutes before Sacco arrived [2026]. Asked by Mr. Katzmann whether he was able to remember any one with whom he had talked at ten minutes to three on various other dates, he answered one of the questions by remarking: "I am not a fortune teller." [2027]

On redirect-examination an attempt was made by Mr. McAnarney to show that the witness and Sacco both came from the same part of Italy and were acquainted with one Mucci, a member of the Italian Chamber, and that the witness had wanted Sacco to take his regards to Mucci. This testimony was excluded by the Court. [2032]

9. CARLOS M. AFFE, dealer in groceries, was acquainted with Sacco. In March of 1920, he sold him some goods [2032], and on April 15th, between three and four, he saw him and received from him \$15.50 in payment [2034]. At the time he made a record of this money in a book and marked the date [2036]. On cross-examination it was developed that he did not always note in this book the date of payments he received [2037]. He produced the book at the trial and at Katzmann's dictation wrote out various memoranda taken from the book. The results were shown to the jury but were not reproduced in the Holt record.

10. JAMES MATTHEWS HAYES testified that he lived at Stoughton, was a mason and contractor and had been Highway Surveyor [2014]. He had been in Boston on April 15th, 1920, and fixed this date by reference to a book produced in court which showed the receipt of some money on that day.

"Tell us now how you remember that you went to Boston on the 15th of April?—I remembered that by a perusal of my time books and by other incidents that happened previous to that.

Well, take up the point where you first got your connection as to your movements April 15th or 14th or 13th. What first set you on the track?—Well, I see by my time book I had received some money the 15th from my brother. . . .

On the 11th of April, one of your children had a birthday?—Yes, sir. And of course I remembered giving the child a little time. The next day, Monday, I worked in the forenoon at,—that is, excavating over at Meade's factory. At noontime, coming home from my father's place I sprained my instep or strained my instep, which made it impossible for me to work, do my work for a couple of days.

Now, what did you do?—I had my Ford automobile, so the rear end was grinding, that is, needed taking down and needed repairing, and I took that down, that rear end down.

When did you take that down?—I took that down Tuesday and Wednesday and a couple of hours Thursday morning, and then I needed some things, grease, and one thing and another, a grease gun in order to put

that back again. And, another thing, previous to that I had joined what they call the Montgomery-Brooks, taking some profit-sharing stock in that Montgomery-Brooks concern, and the 27th day of March I had paid, that is, the 25th day of March I had paid \$126 on that, and before I paid any more I made up my mind I would go and look the concern over and see whether it was worth going through with it or whether I would drop it. So I took the day off. However, I could not work very well at my own work, and also was to make some of these purchases, and I went into Boston a little after twelve, took a little after twelve train and went into Boston, and I went down to this Montgomery-Brooks place and bought the stuff and had the opportunity to look this thing over.” [2015]

Hayes said his train had arrived in Stoughton between five and six in the afternoon [2015]. He did not know Sacco and was unable to say whether the defendant and he had been on the train together. [2016]

On cross-examination he explained he had come to the court to see Woodbury, one of the defense investigators, to give him some information and came again to listen to the proceedings [2016, 2017]. He later said Woodbury had been to see him in October, 1920, to get some information about Stoughton streets and also to locate the witness Dorr [2020, 2021]. He could not remember, in answer to questions from Mr. Katzmann, where he had been on a number of dates other than April 15th; nor could he recall just when the train he took on the 15th had left Boston.

“You did not remember that—you remembered it from looking on your time book?—Did not remember anything until I commenced to look up in my book.

There isn’t anything in your book, is there, about going to Boston, on the 15th of April?—No, but there is things that would call my attention to going.

When next did you go to Boston after the 15th day of April, 1920? —I have not had occasion to look it up.

Can’t you remember?—No, sir.” [2018]

On redirect-examination he was asked what there was in his book that helped him remember the date of his visit to Boston:

“What is there that calls your attention to going—— —I received \$50 from my brother the 15th at noontime, the 15th of April. I used that, part of that \$50, in Boston. That is the thing that called my attention to going.” [2019]

After Sacco, as already noted, had been recalled for further cross-examination in Hayes’ absence, Mr. Katzmann called Hayes back for additional cross-examination. The witness testified that he had been in about the middle of the car on the left side of the aisle on the side of the seat nearest the aisle; also, that he had not talked this matter over

with Sacco or with his counsel nor been asked about it before [2023]. Hayes thus agreed with Sacco as to their relative positions in the train.

11. ROSE SACCO fixed the date of her husband's visit to the consul's office by the fact that on that day she had had company from Milford [2054]. She also said that the smaller photographs had been taken after Sacco's return from Boston [2055]. On cross-examination she said that the letter announcing the death of Sacco's mother had arrived around March 24th, that Sacco had gone for his passport about fourteen days thereafter [2068], but she was positive he had gone on April 15th and said, through the interpreter, "as to one or two days difference, a person could make a mistake, because I have a lot of sorrow," and "I don't think it is much different, because it is over a year he is in prison, and I don't remember everything." [2069]

HENRY IACOVELLI was the visitor from Milford. He had come to Stoughton in response to a letter from George Kelley, dated April 12th and asking him to be at the factory on the 15th. After leaving Kelley he had gone to see Mrs. Sacco [2075]. He was not permitted to tell whether either Kelley or Mrs. Sacco had told him Sacco was in Boston on that day. [2076-2077]

GEORGE KELLEY, one of the sons of Michael Kelley, when called by the prosecution, stated that a few days before the 15th Sacco had asked permission to go to Boston for his passport, saying he would be back if possible on the same day. On the next day, he said, Sacco had reported, that he had not been able to get back on account of crowds at the consul's office [853]. In addition to this occasion, according to Kelley, Sacco had been absent from work a full day about a week earlier. [871]

Called by the defense, he testified to having seen Sacco at seven o'clock on the 16th. He thought Sacco had then already been at work about an hour. [1684]

On cross-examination Sacco admitted that the reason he had given Kelley for not returning to the factory was untrue. He said "it was an excuse" and mentioned that his substitute had been working in his stead [1942]. He was ashamed because he had not kept his promise. [1964]

EDWARD MAERTENS, Stoughton photographer, produced the plate from which the small passport picture had been printed but could not fix the date on which it had been taken as other than "between April and the first of May."

"And the reason why I think it must be made about that time is because I know I got recollection about that a certain soldier came back in my studio to have his pictures, and it was during April and I had to make it for the town hall from Stoughton, for a record, and now because that picture is made only for passport and they tell me in advance that it was going to be used as passports I never record the plates and put them in a box with

plates. It usually takes me three or four weeks to have a box of plates, you know, about twelve bad plates, and I fill them all in one box. Now I found a plate of that soldier in the same box with them together with the girl who came at the same time with Mrs. Sacco, and I put them all in one box, so that is why I think it must be made in that month." [1979-1980]

Maertens had kept no record of the date, he explained, because he never expected to see again people who came for passport pictures. [1980]

b. Discussion by Counsel and the Judge

The subject of Sacco's alibi was discussed by Mr. MOORE in his summation. He explained Sacco's erroneous statement about having worked on April 15th made to Mr. Katzmann just after the arrest as "a pure matter of recollection." He argued that in order to return a verdict of guilty the jury would have to say that the whole Kelley family had lied, that all the witnesses on the subject had lied and "that we of counsel had aided, abetted, advised, encouraged this perjury" [2145]. He concluded by saying: "the time limitations fix me." He then mentioned the names of various alibi witnesses and said that, to convict, the jury "have got to say that they have all committed perjury." [2147]

Mr. J. J. McANARNEY discussed the alibi further. Referring to the testimony about the dinner to Williams, he said this had taken place at noon, and not at night; that the dinner could have been verified; and that a man of the standing of Williams (meaning Dentamore) would not commit perjury for Sacco [2160]. Referring to Hayes he remarked that, had Hayes wanted to help the defendants, he could have said he had seen Sacco and added: "Please let the truth come in, even though it comes through our side of the case and we gave you the truth there" [2170]. He spoke of the dignity of the Italian Consulate and argued that Andrower would not "falsify his name for a murderer though he be a fellow countryman." Mr. Katzmann's trick of discrediting the alibi witnesses by questioning them about insignificant actions on series of dates other than the one in question he described as "taking them over the hurdles." He asserted that, had the witnesses answered questions such as these when no outstanding facts had occurred on these various dates, they would have proven themselves liars. He characterized Katzmann's method of cross-examination as "childish." [2177]

These observations of Mr. McAnarney were just. Some of the questions put to the alibi witnesses on cross-examination were so futile it is astonishing they were permitted, and it is not surprising that at least one of the witnesses, Dentamore, thought them absurd.

It must be borne in mind that a witness may be able to reconstruct details about his actions on a particular date when his attention has soon thereafter been directed to that date. He can then, we know, sometimes remember details for years. On the other hand there is no reason for expecting a witness, after a long lapse of time, to remember similar details

in regard to any date chosen at random at a trial. In legitimate preparation of alibi witnesses, it might, of course, be possible to arrange that witnesses fortify themselves as to details on dates other than the crucial one. Aside from the fact that most alibis are originally prepared, not by attorneys, but by lay friends of the accused, practice such as this invites the charge that the whole story has been fabricated. A dilemma here presents itself which calls for the exercise of judgment by the trial court. Except in one instance the record in this case is barren of any attempt by Judge Thayer to hold the cross-examination within relevant bounds. In the single case of Rosen, a witness for Vanzetti, the court, after pages of questions similar to those described said: "Haven't you tested him on recollection sufficiently?" [1515]

MR. KATZMANN, in summing up, said that, except for John D. Williams, each of the witnesses remembered the banquet because he had not gone there; that Dentamore was the only one who had attended it; and finally that, at the very time when these men had been discussing it as about to take place, the banquet had actually taken place already! He made the comment: "That is the accuracy of recollection of those alibi witnesses" [2193], and added: "There is the galaxy of alibi witnesses." He argued that there was no connection between the events used as the basis of what the witnesses recalled and the recollections themselves: "Do you suppose that there wasn't a banquet to Mr. Williams of the Transcript on the 15th? You know better. You know there was such a banquet" [2194]. He analyzed the alibi argument thus: if the jury did not believe a witness remembered seeing Sacco by reason of having been at the banquet, the witness would show the menu of the banquet. "That is the argument, gentlemen, and where is the logic of it?" [2195] Mr. Katzmann said it was an attempt to prove a ridiculous story by an unmistakable fact.

"That is the alibi defense in this case. I have not begun to do it justice, and the only way that justice could be done to it in its full absurdity and [2196] utter lack of convincing qualities would be to read every word of it and you would be here very likely until Labor Day." [2197]

Discussing the testimony of Williams, Mr. Katzmann did not dispute the fact of his meeting with Sacco, but he questioned the date of that meeting [2194]. He argued that Williams said he had visited the doctor once a week before and after April 15th, and had been contradicted in this by the doctor himself [2202]. (The doctor had testified to four visits in March, one in April, one in May and three in June [1661].) Mr. Katzmann then said:

"There is a test of the recollection of John D. Williams. That is recollection; and the only piece of evidence he gave that was founded on recollection he was wrong on according to Dr. Gibbs. And he is one of their principal alibi witnesses. What weight will you give to the testimony of such a witness as that?" [2203]

He referred to Andrower's testimony to the effect that he fixed the date by looking up the calendar pad, by saying:

"Mind, you he has 150 or 200 applications for passport a day, or they had in the consul's office, and that the 15th was a very slack day and that he remembered that Sacco was in on that day because when he came in with the family photograph of large size, taking it into the secretary to the consul, they looked at it and laughed, Andrower says, and expects 12 men in the county of Norfolk to believe it. 'I remember the day because I happened to look at a calendar pad on the desk of the secretary.'

"Gentlemen, if I were to be hanged because I could not tell the day I have looked at a diary or a calender since this trial first opened, I would be hanged 40 times a day. If you can tell me what day—mind you, this deposition was taken May 21, 1921 and he talking about April 15, 1920—if any one of you gentlemen can tell me the day that you, if you looked at a Calendar pad on the 15th day of May you possess mental attainments that are not human, and Andrower says he is sick.

"And he goes on to say that it is of daily occurrence for family group pictures to be presented when a man who has a family desires passports. He does say this was the largest picture he ever saw and he remembers it that way. Possibly he remembers the picture, but the way that he ties up to the all-important date of April 15th is because when he was laughing on that day—and is laughing so unusual a thing to him that he could remember it 13 months afterwards to May 1921—he happened to look at a pad, a calendar pad on a desk and he remembers it was the 15th of April.

"Well, maybe you believe that, gentlemen. Maybe you have grown up to years of descretion and you accept that. That is his testimony. He worked there for some time. He gave two different dates as the time he ceased his employment. May 18th and May 20th, 1920. He had between 140 and 200, or the office had between 140 and 200 applications for passport on the average daily, and he could remember that in the early part of April Sacco came in, and that is what Mrs. Sacco says and Sacco himself said to me when I examined him in the police station at Brockton on the 4th or 8th or 10th and that he worked the day before he read in the newspapers of the atrocious murders in South Braintree." [2235]

In his charge to the jury JUDGE THAYER said with reference to the alibi: "if you find such to be the fact, as it is purely a question of fact—then that would be a complete defense to these indictments and therefore you should return verdicts of not guilty. . . . If the evidence of an alibi rebuts evidence of the Commonwealth to such an extent that it leaves reasonable doubt in your minds as to the commission of the murders charged against these defendants, then you will return a verdict of not guilty." [2263]

On December 24th, 1921, Judge Thayer denied a motion for a new trial on the ground that the verdicts were against the weight of evidence. He said the jury had the right from the evidence in its entirety to find the defendants had been at South Braintree "and that the 'alibi' testimony was insufficient and therefore because of that fact it was disbelieved."

He called attention to Sacco's lie concerning his work on the 15th and to the District Attorney's argument that there was no legitimate reason why he should have lied about it. [5561]

"In other words if the defendant Sacco had told the truth that he was at the Italian consul's office on the afternoon of the day of the murder the Commonwealth claimed that no harm could have come to him because of that fact and if no harm could have come to him then the jury had a right to say that the reasons given for the falsehoods told were intentionally untrue and were therefore disbelieved, and if disbelieved the jury had a right to say that the 'alibi' testimony failed because he could not and did not honestly and truthfully account for his whereabouts on the afternoon of the day of the murder." [5562]

The subject of Sacco's alibi was not involved in any of the subsequent motions for new trials.

On the appeal from the judgment of conviction there was only one question which had relation to this alibi. Dentamore had not been permitted to testify concerning the conversation with Sacco in which he wanted Sacco to send regards to Mucci. The Supreme Judicial Court, in upholding the exclusion of this testimony, said that the only bearing of this proof would be that it would permit Dentamore to corroborate himself, and that whether or not he should be allowed to do so was in the discretion of the trial Judge. [4341]

c. Before Governor Fuller and the Lowell Committee

In the petition to Governor Fuller for clemency reference was made to the affidavit of MRS. LOIS B. RANTOUL [4916]. Mrs. Rantoul had attended the trial as a representative of the Greater Boston Federation of Churches and had made a report [4932] after the trial in which she discussed the alibi and found it "honest and sustained." In her report she called attention to the fact that the arrest had occurred only three weeks after the crime and that therefore the witnesses had been able to check up their facts. She said, referring to Hayes, "an extraordinary identification supporting his alibi was made by Sacco" and added that, in her opinion, Hayes had conclusively shown he had been in Boston on the 15th of April and had ridden on a train in the late afternoon. [4942]

As no record of the proceedings before Governor Fuller was kept it is not possible to say what additional evidence, if any, he considered.

The Lowell Committee called before it, on the afternoon of July 14th, 1927, Felice Guadagni and Albert Bosco. From the minutes of its proceedings it seems as though this examination had been arranged without the knowledge of the defendants' counsel, who were unaware of the purpose for which the witnesses were called. The letter which defendants' counsel wrote to the editors of the Holt Publication [5256c] confirms this inference.

GUADAGNI, when examined by President Lowell, was very sure he had seen Sacco on April 15th because of the banquet held on that day. He said, the banquet had made an impression upon him: "The impression, because I was invited. An Italian newspapermen's banquet. It was in a church." [5086] He thought it was held at four o'clock. He was shown both the *Boston Transcript* and the *Gazetta de Massachusetts* for May 14th, which fixed the dinner to Williams as having taken place on the night before, and was asked to explain the discrepancy:

"—Yes, certainly. I speak about the banquet, I was invited with a friend of mine Orlandini, and somebody mistaken in the day, but I remember Sacco at the coffee house, he ask me, 'Why you don't come to the banquet,' and I say, 'You know I don't come to any banquet.' The banquet was in a place, in a church house.

But you remembered that it was the day of the banquet that you met Sacco?

JUDGE GRANT. (Addressing the witness) You said so, didn't you?

THE WITNESS. There must be some mistake. I recollect the banquet in this place and this talk with Sacco, because he spoke about the banquet with another man who was a friend of Sacco. [5087] . . .

But you do not explain how you happen to have stated that that was the day of the banquet when it was not?—I was not careful, I don't talk, I do not know that something of that kind comes up. I had in my mind, in my conscience, that Sacco was there when I spoke about the banquet to Williams. I was there with Sacco in the coffee house, and some friends were there.

You did not take pains to look up the date of that banquet before you testified?—No.

PRESIDENT LOWELL. That is all I have. You may ask any questions you wish.

THE WITNESS. I was so sure of that day. There are so many things I can tell about my work." [5089]

Mr. Thompson then cross-examined the witness and called his attention to his testimony at the trial. Guadagni said his answer at the trial to the question "when was the banquet to be" was in error [5090], as the banquet had already taken place when he discussed it. "But I know in my conscience what I say is the real story" [5091]. Asked for his reasons other than the taking place of the banquet for believing he had seen Sacco on the 15th, he gave a long answer in which he named in detail the people with whom he had talked and set forth the various things he had done to fix the date, ending with a plea to the Committee that they go to the bottom of the story, and asserting that were they to do so, they would reach the conclusion "that this is a shame, this is a crime, to send Sacco and Vanzetti to the electric chair." [5092]

President Lowell asked him if he had meant it when he said the banquet took place that night and he said yes, and said that he thought it was

true; "I said what was my conviction." [5093]

"You meant it, yes, and you meant the jury to understand that you knew when you had seen Sacco because the banquet took place that day?—No.

Then why did you say it? You made that statement and meant it, and that statement was not true, was it, that the banquet took place that night?—I meant——

JUDGE GRANT. Answer that question.

Was that statement true or not true?—It was not true.

PRESIDENT LOWELL. That is all I have to say.

Recross-Examination

(By Mr. Thompson.) Did you mean to tell Mr. Lowell that you intentionally told a lie?—No.

PRESIDENT LOWELL. No, and I never asked him that." [5093]

Mr. Thompson now stated that he thought a mistake was being made with the witness, and the witness said he did not intend to convey to the jury that the banquet had not yet happened when he was talking about it. There was the following discussion:

"PRESIDENT LOWELL. It had not happened.

MR. EHLMANN. What was the date of the banquet?

MR. THOMPSON. He was talking with Sacco on the 15th and the banquet happened on the night before.

PRESIDENT LOWELL. No, the banquet was on the 15th of May.

MR. THOMPSON. I did not understand that at all.

PRESIDENT LOWELL. It happened four weeks after this man Sacco was in prison. You have missed the point entirely. The banquet took place four weeks after.

MR. THOMPSON. Then what under the sun did the date of the banquet have to do with Sacco when Sacco was in prison? [5094]

PRESIDENT LOWELL. That is just the point. There is no reason." [5095]

President Lowell asked Guadagni several lengthy questions as to why he should have been talking about the banquet on April 15th, but before the witness answered them further discussion took place.

"PRESIDENT LOWELL. The point is this: He told the jury he remembered he saw Sacco on the 15th because that was the day they talked about the banquet. They said to him, McAnarney said to him, 'When was that banquet?' and he said it was on the 15th. Now it turns out it was not on the 15th at all.

MR. THOMPSON. Is that perfectly clear?

PRESIDENT LOWELL. There is no doubt in my mind at all. (Indicating.) Here it is, you can look at it.

MR. THOMPSON. If you say that is so, I am perfectly willing to accept it.

PRESIDENT LOWELL. I have the whole thing. What I want to know is why he told the jury that he remembered that that conversation was on the 15th. McAnarney said to him, 'When did the banquet take place?' He said that very day.

MR. THOMPSON. I want to know beyond that.

PRESIDENT LOWELL. It is perfectly easy. These men found the banquet took place on that day and they accepted it. I happened to look it up by simple accident. This man testified it occurred at night and another one testified it occurred at noon, and I looked it up and found it occurred in the evening of the 13th of May. Moreover, Mr. Williams informs us by telegram that that is the only banquet that he attended. That is the point I want to make. This gentleman told the jury that he knew this happened on the 15th because that was the day they discussed the banquet." [5095]

Mr. Thompson next said that there might have been two banquets and President Lowell commented on the fact that three people had fixed the same date. He said: "there is something wrong," and suggested that Mr. Thompson ask the questions because, when he himself did so, the witness "goes off onto something humanitarian" [5096]. Defendants' counsel stated he was convinced there was some explanation and that McAnarney "is not such a fool as to put on any such testimony." Mr. Thompson told the witness he could believe Mr. Lowell, because Mr. Lowell had looked it up and knew that the banquet had taken place after Sacco was arrested [5097]. The witness said he had discussed his testimony with Jeremiah McAnarney [5098]. Mr. Thompson then wanted to know how the idea had come into his head and whether it had arrived there corruptly. Judge Grant remarked that the Committee did not suspect Mr. McAnarney of wrongdoing, but remarked that the idea might have originated with some member of the Defense Committee.

The banquet, Guadagni told them, had first been mentioned by Dentamore [5099]. Dentamore, (who had been editor of *La Notizia*), was a Catholic priest and a philosophical anarchist. The witness had fallen in with him believing the date of the banquet was right and now he realized it was all wrong [5100]. "It has nothing to do with Sacco, the banquet." He said he had believed when he was on the witness stand that it did. [5101]

"Have you any other reason that you know, yourself, besides those three reasons, the banquet reason, which now turns out to be no good, the grocery reason, which I will not attempt to characterize, and the talk that you had with Androa, have you any other reason that brings up anything in your own mind, any memory in your mind, that brings up in your own mind that Sacco was in Boston on the 15th?—No.

MR. THOMPSON. Very well. Then I think we have got to the bottom

of what you really know about this case (addressing the witness). And I think he can be exonerated from any intentional wrong.

DISTRICT ATTORNEY RANNEY. I don't know about that.

PRESIDENT LOWELL. You admit that his evidence is worthless as personal knowledge?

MR. THOMPSON. I should think so.

PRESIDENT LOWELL. Judge Grant suggests that it is a pretty fine point, three men getting together and accepting the idea of one on something that is not true, one taking something from another and carrying it forward, that that is a pretty fine point. For the purposes of the testimony in the case, we are not going to accuse Mr. Guadagni here of committing [5101] perjury; that is absurd; we are not going to do that." [5102]

President Lowell asked Mr. Thompson to question ALBERT BOSCO. Bosco had spoken to Moore about his testimony before he went to Court.

"How do you know that was the time you saw Sacco, on April 15th?—When Sacco and Vanzetti were arrested, some weeks after when I see a countryman and they show me a paper with a picture and he ask me, 'Did you remember the day I introduce you to Sacco?' And so that day was the day that somebody gives a party to the editor of the Transcript, to Mr. Williams—

How do you know that?—Because I put it in my paper where I was working, La Notizia.

You put it in on the 15th?—Yes, sir; the day after.

Did you look it up?—Yes.

PRESIDENT LOWELL. It is perfectly obvious that is not so.

Can you send for that paper?—Yes.

As a matter of fact, that banquet did not happen until after Sacco and Vanzetti were arrested, it did not happen in April, it happened in May?—When they were arrested I see in La Notizia, I see the 16th of April, the day after, because the newspaper come out in the morning, and the same newspaper says about Williams, and I recall the fact it was the same day I was introduced to Sacco.

When did you think the banquet was?—The 15th.

Of what month?—April.

No. It was not, it was in May.—No, it was in April.

No, you are wrong.—No, it was the 15th of April.

No, Mr. Lowell has looked it up and he finds it was not until the 15th of May, and that is right.—Well—

[By President Lowell.] Do you know the Gazette?—Yes.

[Showing a paper to witness.] I am going to show you something that was copied from the Gazette. Where was that banquet held?—I don't know. [5103]

[Indicating.] Can you read that? That is copied from the Gazette No. 18 de Massachusetts of the 14th of May.—But this is something that the Italians give to Mr. Williams. I think it was another dinner.

No, Mr. Williams says there was only one dinner.

MR. THOMPSON. Perhaps there was another one.

THE WITNESS. I think I can find the number on the 16th of May, 1920. [sic]

You still think that occurred on the 15th of April?—Yes, sir, in the night.

You are sure it was on the day that that occurred that you saw Sacco in Boston?—Yes, sir.

And if it did not occur on the 15th of April then that was not the day that you saw Sacco in Boston?—No, it was that day.

The day of the banquet?—The day of the banquet.

Supposing the banquet did not occur on the 15th of April then the day you saw Sacco was not on the 15th of April?—Because I got another recollection. I had a lot of discussion with Guadagni at that time to be sure of the date that I was introduced to Sacco.

You know it was the day of the banquet?—Yes. Another thing, in La Notizia the fact of the South Braintree I wrote myself." [5104]

He said that the dinner had taken place at night and that he had not seen Dentamore on the day of the banquet. He knew he had seen Sacco on the 15th because, after Sacco's arrest, he had looked back to the paper and had discovered that the banquet had taken place on the 15th. At this point the witness was told the Committee had discovered that the banquet had not taken place until May 13th. He said that he was still sure of the date.

"PRESIDENT LOWELL. I don't know that we can do any more with Mr. Bosco, except to ask him to bring up his paper.

[Addressing the witness.] You say in your testimony that you went and looked it up?—I see it in La Notizia because I put it in the paper myself. Moore ask me how I knew and I say I went and look in my paper to make sure and I found it in my paper.

MR. THOMPSON. There must have been two banquets.

PRESIDENT LOWELL. It cannot be so. He said he went and looked in [5105] his paper, therefore, if it is not in his paper he did not go and look in his paper. [Addressing the witness.] You bring up your paper here at eleven o'clock to-morrow for the 16th of April and the 13th of May, 1920." [5106]

On the next day the minutes show:

"The witness Bosco who was on the stand yesterday afternoon again appeared, with the editions of the paper La Notizia, requested by the Committee, and the Committee, all counsel present, and the witness look in the books produced by the witness." [5109]

In response to an inquiry addressed by the editors of the Holt Publication on November 27th, 1928, President Lowell wrote on December 8th:

"On the day following the testimony of Guadagni, Bosco produced before the committee the files of the *Notizia*, by which it appears that there was a luncheon given for Mr. Williams on April 15 (the date of the murder) at an Italian priory in the North End. The committee, in their subsequent deliberations, assumed it to be a fact that besides the larger public dinner, given to Mr. Williams on May 13, this luncheon also took place on April 15." [5256b]

Messrs. Thompson and Ehrmann, writing on December 26th, 1928, and refreshing their recollection from a memorandum prepared by them after the event, stated the following: On July 14th, 1927 Bosco and Guadagni appeared before the Lowell Committee without the defendants' counsel having known of their coming. After the witnesses had testified Mr. Lowell said a serious alibi had been destroyed. The next day Mr. Lowell and Judge Grant read the article in *La Notizia* of April 16th, 1920, and Mr. Lowell then announced that a mistake had been made [5256c]. Mr. Stratton, who had originally obtained the information regarding the dinner from Williams of the *Transcript*, thereupon conferred with Williams by telephoning to him in Washington, and announced that Williams now remembered the banquet had taken place on April 15th and that there had been only one banquet. Mr. Thompson called attention to Bosco's testimony at the trial and asked why the Committee had not looked the matter up in *La Notizia*. No reply was made to this question. The witnesses were now recalled and advised that the dinner actually had taken place on the date on which they had testified that it had. Mr. Lowell apologized to them and expressed his regret for the mistake. Permission to put a statement of what had occurred in *La Notizia* was refused. Mr. Thompson then asked whether this information did not raise a reasonable doubt of Sacco's guilt. The only answer was Judge Grant's: "You are just back where you were before." [5256d]

When the typewritten report was received and no mention of the discussion just referred to found in it, Mr. Thompson questioned the stenographer. He was informed that Mr. Lowell had given instructions that no colloquies be taken down. [5256e]

A photostatic copy of the article in *La Notizia* about the banquet was submitted, with counsel's letter, to the editors of the record, together with a translation of it by Dr. May Wallas of the University of Cambridge [5256e]. The translation says the Franciscan Fathers of North Bennett Street gave a banquet and that after the banquet Mr. Williams visited the parochial school and heard the girls recite in his honor [5256g]. At what time of day the banquet took place does not appear in the article in the newspaper.

In his argument before the Lowell Committee, Mr. Thompson said in reference to the alibis:

"I want to say a word about [5311] those alibis, because it illustrates perfectly the infirmity, even of the ablest and most powerful minds, in dealing

with human testimony. Here were two obscure Italians, Professor Guadagni and Bosco. They came in here and they told you their stories. One of them tried to tell how friendly he was with Sacco and what an awful thing he thought this was. But you did not know them; they were nothing but obscure and, as you very likely thought, lying Italians. Mr. Williams, formerly of the Transcript, had a position in the world; Mr. Williams was known, his name is an English name. He had a position. True enough, he had been editor of the American, but, still, he was a man who was not given to lying. Men like Guadagni and Bosco tell lies, but not Williams! Then when they went down and got the files, Williams turned out to be reckless, careless, even his last statement turned out to be wrong. He said that there was only one dinner given. Shouldn't that be a lesson? It was to me. I joined right in with it; I thought these men were guilty of a most horrible blunder and I believed Williams when he said it. I could not believe that a man like Williams was to be discredited, and Bosco and Guadagni were to be the truthful men. I myself fell into the same habit of mind. The familiar men, men of our own kind and type, we believe; the foreigner, even though he may have every mark of honesty on his face, yet it is blurred, it is not clear. Now, it turned out that the foreigner was right and the Englishman was wrong.—Williams was wrong.

"Now, what are we going to say? These men were perfectly truthful men. That banquet did take place on that day; the reasoning of Guadagni was correct reasoning; he did connect up that banquet, and he connected it up with seeing Sacco just as he said he did. He spoke imperfect English; he was confused on the witness stand. It was easy for a man like Katzmann to make a fool out of Guadagni and Bosco. You made a fool out of them here without any excitement at all. But the truth came right straight out in this room.

"Now, did that create a reasonable doubt in your minds, or didn't it? To me it created much more than a reasonable doubt." [5312]

Governor Fuller's only discussion of this subject in his report reads as follows:

"Sacco claimed to have been working at Kelly's shoe factory on April 15th, the date of the South Braintree crime. Upon investigation, it was proven that he was not at work on that day. He then claimed to have been at the Italian Consulate in Boston on that date but the only confirmation of this claim is the memory of a former employee¹ of the Consulate who made a deposition in Italy that Sacco among forty others was in the office that day. This employee had no memorandum to assist his memory." [5378g]

This statement, obviously, is a distortion of the testimony.

The Lowell Committee, after reviewing much of the evidence on the trial, but none relating to the alibi, said:

"On these grounds the Committee are of opinion that Sacco was guilty beyond reasonable doubt of the murder at South Braintree. In reaching this conclusion they are aware that it involves a disbelief in the evidence of his alibi at Boston, but in view of all the evidence they do not believe he was there that day." [5378y]

¹ Andrower.

The Committee made no other reference to the matter, except the query:

"If he were innocent of the crime, and had been in Boston that day to get a passport, why should he not have said so when first questioned?" [5378x]¹

It is difficult to escape the conclusion that in its treatment of Sacco's alibi the Lowell Committee was not actuated by the impartiality and open-mindedness which the outside world had the right to expect. To have inquired privately of Mr. Williams of the *Transcript* about the date of the dinner and to have referred to newspapers in the absence of counsel for the defendants seems at variance with the method of procedure outlined by the Committee. [5378i]. Having discovered what it believed was an error in the date of the banquet the natural course for an impartial investigator would have been to ask an explanation from the defendants' counsel. In view of Bosco's testimony at the trial to the effect that he had refreshed his recollection about the date by looking up the account of the banquet in *La Notizia* [1662, 1664], it seems reasonable that the Committee should have referred to this paper or at least have asked counsel to procure its files.

The actual course it pursued was to call the witnesses without explaining to counsel what it was endeavoring to establish and then to attempt to discredit the witnesses themselves without advising them, until well into the testimony, what the Committee thought it had discovered. Moreover, the manner of the Chairman, President Lowell, in his conduct of the examination and in his colloquies with counsel, seems that of a partisan seeking to vindicate a position rather than that of an impartial investigator.

II. *Vanzetti's Alibi*

Vanzetti's claim was that on April 15th, 1920, the date of the murders, he had spent the entire day in Plymouth where he lived, and so could not have been in South Braintree, about twenty-five miles distant. Testifying in his own behalf he outlined his movements during that day. He had peddled fish in the morning, talked on the shore in the afternoon. In regard to the sale of fish he was corroborated by Rosen, Guidobone, Mrs. Brini, and her daughter; and Corl and Jesse supported him as to the talk during the afternoon.

The prosecution disputed the testimony of these witnesses on the ground that they had no means of fixing the date about which they were testifying and also because most of them were friends of the defendant. It was claimed that Vanzetti had been on a train which arrived at East Braintree at about ten on the morning of the crime, that he had been seen in a car in South Braintree between ten and eleven, and that he was observed in the escaping murder car just after the shooting and also about an hour later at the Matfield crossing, headed towards Plymouth. There was no

¹ The importance of this falsehood has been discussed in the preceding chapter.

possibility of his having been in these places if any of the witnesses who testified on his behalf told the truth.

a. Testimony at the Trial

1. VANZETTI testified that he peddled fish in Plymouth during March of 1920, buying some of his stock from Carbone and some from a man in Boston [1698]. On April 8th he received an express shipment of four hundred and eighty-eight pounds of fish [1699] which it took him about three days to dispose of. After that he got some other stock from Carbone and these goods he finished selling on Thursday, the 15th [1700], peddling on that day in Cherry Street and down Suosso's Lane to Castle Street. Here he met the peddler Rosen whom he took with him to the Brini house with the purpose of showing Mrs. Brini, who knew cloth, the piece the man wanted to sell him [1701]. That had been "near one o'clock, about half past eleven, something like that, half past twelve, about one o'clock," Vanzetti said.

After having sold all his fish he took his cart to Corl's house and went down to the shore. There he had a long conversation with Corl, busy painting his boat [1702]. Jesse, the boat builder, and Holmes, who worked in the lumber yard, also came down while he was there. He took the cart to his house, changed his clothes and had his supper, but he did not remember where he went after supper. [1703]

On cross-examination the only question asked Vanzetti about his movements on April 15th concerned his whereabouts at 12:13. He said he had been near or in Mrs. Brini's house, that he had been in it between twelve and one o'clock, nearer to one. He fixed this time by the fact that while he was there the people from the Cordage plant were just going back to work. [1739]

He was cross-examined at length as to his recollection of events. Differences between what he recalled at the trial and what had been his recollection when questioned by Mr. Katzmann at Brockton, on May 6th, were pointed out. The following are instances: at Brockton he had said he had slept only one night in Boston within the immediate past, when in fact, as he testified at the trial, he had slept there two nights [1753]; he would not deny having said at Brockton that he had left Plymouth on Sunday morning, May 2nd, when in fact it was Saturday, May 1st. [1754]; in addition he had been unable to remember at Brockton whether he had received the shot-gun shells in Sacco's house on the preceding Tuesday or Wednesday, whereas at the trial he said it was on the Wednesday. [1771]

Asked whether he could remember what day of the month it had been when, at the trial, he called Connolly a liar, Vanzetti said "No, I don't take a note" [1767]; he was also unable to remember the date when he first knew he was charged with the murder [1768] or to recall just where he had been at various times on April 14th. [1769]

Asked if he had not said at Brockton that he peddled fish almost every day in April, he answered: "Maybe I tell you that . . . I peddled fish in April all the time I have" (presumably meaning that he peddled fish whenever he had any) [1791]. He admitted he had said at Brockton on May 6th that he did not know his whereabouts on the Thursday before Patriots' Day.

"You did not remember where you were on the 15th of April, did you?—More probable, yes.

But after waiting months and months and months you then remembered, did you?—Not months and months and months, but three or four weeks after I see that I have to be careful and to remember well if I want to save my life.

That four weeks after the date you could not remember, but seven or eight weeks after you could. Is that right?—I say that after three or four weeks after my arrest I understand enough to see [1802] that I have to be very careful to save my life and my liberty and I have to remember.

Weren't you careful, sir, when you were making your reply to that question?—Yes, but I never know in that time on the day 15th and the day 24th it was the day of the assault at South Braintree and Bridgewater. I don't know in that time.

Didn't you intend to tell me the truth where you were on any day that I asked you?—I intend to tell you the truth, but I never can dream that you will say that on the 15th and the 24th I went to steal and kill a man.

Then if you could not dream that you were to be charged with murder on the 15th of April, how was it you were so certain that you could not remember where you were on the 15th of April?—Because in the 15th of April is a day common to every other day to me. I peddled fish.

Didn't I fix it, Mr. Vanzetti, by the holiday, the 19th of April, when I talked with you?—Yes, but probably I don't make any speculation on that patriotic day, you see." [1803]

No testimony was introduced by the prosecution to show that when Vanzetti was questioned by Mr. Katzmänn his attention had been in any way directed to the murders at South Braintree, a fact which Mr. Katzmänn himself recognized in his summation. [2207]

2. ANTONIO CARBONE testified to having sold fish to Vanzetti on April 13th or 14th [1625] and SALVATORE BOVA testified that he had sold some to Carbone; but Bova did not know to whom Carbone then resold it. [1626]

3. The peddler, JOSEPH ROSEN, testified that he had sold Vanzetti a piece of goods in a house on Cherry Street, Seaside, a few months before April 15th, and that on April 15th he had met Vanzetti in the street selling fish [1495]. He had been taken by the defendant to a nearby house, he stated, where, after the material was first shown a lady, he sold him

another piece [1496]. Rosen fixed the visit at near noon by the fact that the people from the plant were going home to dinner [1497]. He had gone that night to Whitman where he stayed at a place belonging to a man named Littlefield. [1497, 1498]

On cross-examination Rosen was unable to remember where he had been on a number of selected dates [1499]. He gave a good account, however, of his movements during the weeks preceding his appearance in court. [1513-1515]

He stated that the matter of Vanzetti's whereabouts had been first called to his attention by the lady¹ who had been at the house where the goods were bought. He said he had mentioned the subject to no one [1501] with this exception, that, on the occasion of seeing Vanzetti's picture in the paper, he had spoken to his wife. The publication of this picture had taken place about two months after April 15th. [1503]

"Then is it not the fact that he was arrested between the middle of June and the first of July, 1920?—I suppose it must be so.

You know it is so, don't you?—I suppose it must be so, I don't know it positively.

Don't you know?—I don't know. You are saying it; I think so.

I am asking you, sir, isn't that eight to ten weeks after the 15th of April?—I don't know. That way it looks it is.

Well, it looks all right, doesn't it?—I suppose so.

The arithmetic is all right isn't it?—Yes.

The calendar hasn't changed any, has it?—I hope not.

Then it is between the middle of June and the first of July?—As long as you say so.

I am asking you, whether you say so?—I agree with you, then.

You do, and you are sure of it, aren't you?—I suppose so.

Well, you have to answer that. Are you?—Well, I don't know; you see, just as long as you are saying it I got to keep with you.

You are going to stay with me; then stay with me. Answer the question. Are you sure it was between the middle of June and the first of July that he was arrested?—I think it must be." [1504]

Rosen was questioned on cross-examination about sales he had made to persons other than Vanzetti on that day, but although he described their occupations and appearance, he could not give the names of any of them. An example of this testimony follows:

"Opposite the end of Middle Street?—I can't tell you correctly.

Why not?—Because I just know he lived on Middle Street, but I can't just give you the house just correctly. If I take you down with me I could show you immediately.

Tell me here.—I can't do it. I am not a biographer.

Did you sell anybody else in Plymouth that afternoon?—I been in the chief of police's house.

¹ Mrs. Brini.

Did you sell him?—I was trying to sell his wife some ladies' stuff. She was washing, I remember, that day.

Yes. On a Thursday?—I think so. She must have been doing something around the kitchen.

Was she washing or not, on Thursday?—I say she was——

Did you see her washing?—Washing. [1509] . . .

Anything else you can remember about her?—I noticed in the house an antique, you understand, piece of furniture of an old style, so I asked her, 'What is that?'

Never mind what she said to you. Did you buy the antique?—Oh, me? No." [1511]

He said that the first time he met Vanzetti was in Cherry Street, at a different house from the Brini house [1512]; that the same lady had been present on both occasions, and had, on the first day, bought from him a piece of goods. [1513]

On redirect-examination Rosen fixed the date of his trip to Plymouth by the fact that on arriving in Whitman at night he had found the people talking about the Braintree murder; and also by the fact that on that day his wife had paid his poll tax [1518]. The receipt for the poll tax was introduced in evidence. [1519]

That a room had been rented at Littlefield's in Whitman on the night of April 15th was testified to by Miss LILLIAN SHULER from the records she kept [1522]. This witness was not asked to identify Rosen as the roomer.

4. The woman who had looked at the cloth was MRS. ALPHONSINE BRINI, who lived on Cherry Court and had known Vanzetti for eight years [1522]. She testified that she had seen Rosen with Vanzetti on April 15th between 11:30 and 12:00 o'clock and that she had seen Vanzetti with his fish between 10:30 and 11:00 in the house of her landlady, Mrs. Forni. She fixed the date as being one week subsequent to her return from the hospital. [1523]

On cross-examination she stated that Vanzetti was on terms of intimate friendship with her family. On April 15th, 1920, she was living, she said, in Suosso's Lane. (This statement contradicts Rosen's who fixed the place as Cherry Court.) She also contradicted Rosen by saying she had never bought goods from him. [1526]

On redirect-examination Mrs. Brini testified that she remembered the date in question because her husband had on that day called the lady doctor to come to see her, and because Dr. Shurtleff, a different physician, had seen her on the day before and also on the day thereafter. [1527, 1528]

At this point in the proceedings counsel and the Court conferred with the result that it was later stated that Mrs. Brini "has in another case testified on behalf of the defendant Vanzetti as to his whereabouts different from the place set forth in that case" [1555]. The statement was

not exact, since at the Plymouth trial Mrs. Brini had not been an alibi witness but had merely testified to some collateral matters.¹

5. Mrs. Brini's daughter, Miss LEFAVRE BRINI, who was fifteen years old, testified that she was working at home on April 15th and saw Vanzetti at about 10:30 when he brought her some fish [1537]. She saw him again, near noon, this time with the peddler. She fixed this date as being one week after she had left work to care for her mother on the latter's return from the hospital, recalled it as the day of the nurse's arrival, and as the day before the visit of Dr. Shurtleff. [1538, 1539]

On cross-examination Miss Brini was asked the question whether she had at the time told herself she was looking at the piece of cloth one week after she had left work. Numerous questions of similar nature, and in like vein were put to her. To all of these she answered in the negative and said finally: "That is just like the other questions you have asked me" [1539]. She said she had not considered the matter under discussion as being important until after Vanzetti's arrest. Upon stating that she did not remember when Vanzetti had started in the fish business she was asked whether that fact was not of more importance than a single visit to leave fish. When Mr. Callahan objected to this question Mr. Katzmänn said: "I am seeking to be gentle with the child . . . intended with the utmost kindness to the child" [1540]. When the court overruled the objection the witness said both dates were important [1541]. She remembered that Vanzetti had been at her house on the day her mother came back from the hospital, April 8th, but she did not remember any other day after the 15th when he was there. [1542]

Miss Brini admitted on cross-examination having talked over her testimony with her mother:

"How many times since Vanzetti's arrest have you and your mother talked over about where he was on the 15th?—Any time we happened to.

How many times would that be in all?—I can't answer you that question.

Is it so many times, Miss Brini, that you can't remember? Mr. Vanzetti wants you to speak louder so he can hear you. Perhaps I am to blame for that because I have not been speaking loudly enough. I was afraid I would frighten you if I did. You are not frightened of me, are you? All right. So now speak so Mr. Vanzetti can hear you. How many times, Miss Brini, would you say you talked over with your mother about what you and she were going to say about where he was on the 15th of April?—[Witness hesitates.]

Can't you answer that?—It is impossible to answer that question.

Well, Miss Brini, is it impossible because you have talked it over so many times with your mother?—[Witness hesitates.]

MR. KATZMANN. Well, I won't press it." [1543]

She was asked a blind question about March 18th which puzzled her.

¹ See page 194.

It appearing that this was the day on which her mother had gone to the hospital, Mr. Katzmänn asked if she should not have remembered that day more than the 15th. This line of questioning left the witness somewhat confused:

"Don't you fix March 18th? Doesn't that date mean anything to you, March 18, 1920? Doesn't that date mean to you, Miss Brini?—[Witness hesitates.] Why should it?

Is that your answer to me? Do you love your mother, Miss Brini?—Yes.

Don't you know that was the day that she says she went to the hospital?—Yes.

And that date didn't mean anything to you?—Why, yes.

Well, why didn't you remember it when I asked you?—[Witness hesitates.]

Excuse me for raising my voice to you, I didn't mean to frighten you. Why didn't you remember it, Miss Brini, when I told you the day?—I did not know what you meant by that.

You know what March means, don't you?—Yes.

You know what 18th means, don't you?—Yes.

You know March 18th is a date, don't you?—Yes.

When I asked you about March 18th, you did not remember, did you, that that was the day your mother was taken out to the hospital—was taken out of the house to the Jordan Hospital did you?

MR. CALLAHAN. Wait a minute. I pray your Honor's judgment.

That your mother went to the Jordan Hospital?—[Witness hesitates.]

You did not remember that, did you, Miss Brini?—[Witness hesitates.]

Is that too hard to answer?—No.

Will you please answer it?—[Witness hesitates.]

THE COURT. I wish you would please answer it if you can.

THE WITNESS. I did not remember when you first asked me.

You did not. And that is why you said to me, 'Why should I remember March 18th?'—Yes.

Don't you think you should have remembered March 18th more than April 15th?—[Witness hesitates.]

THE COURT. Won't you please answer the questions so we can go along? [1546]

MR. KATZMANN. I won't press it, your Honor." [1547]

An attempt was made to fix the visit of the nurse, GERTRUDE MARY MATTHEWS, but she remembered only that she had called on Mrs. Brini several times during April, probably between the 15th and the 25th, and could not recall the date of the first visit [1634]. The records of the Cordage Company's nurses department were not admitted in evidence because ELLA M. URQUHART, a nurse who kept the records, did not have first hand knowledge with regard to the visit to Mrs. Brini [1583]. No effort was made to refresh Miss Matthews' recollection of the date by

showing her the record nor was any effort made to prove that Dr. Shurtleff had called on Mrs. Brini.

6. ANGEL GUIDOBONE, a rug worker, who had known Vanzetti for about six years, saw him in the street selling fish on April 15th and got from him, at a little past twelve o'clock, some codfish he had ordered the day before. He fixed the date by reference to an appendicitis operation he underwent on the 19th [1587]. On cross-examination he said:

"Now, being operated on on the 19th for appendicitis, you could have bought codfish just as well on the 14th, couldn't you?—I bought it on the 14th and on the 15th I got the fish in my hand, and I had it.

Could you have bought the fish on the 13th and been operated on on the 19th?—Well, you want me to buy fish months before and then eat it months afterwards? [1588]

Would the 13th be months before the 19th?—Why, no, but do you think I keep a fish in the house for a week?

Well, how do you know but what you ordered on the 12th and got it in your hand on the 13th just as you are telling us about two other days?—That is not so.

How do you know it isn't so?—Well, of course, I remember I had the pain here and on the 19th I went and had the operation, and of course I got the cut here, and then I know.

Well, I will take your word for the cut, but I am asking you how do you know you did not order the fish on the 12th and get it in your hand on the 13th? How do you know it? That is the question.—Well, how could I say to-day is Thursday and could I say it is Wednesday?

Well, how can you say it was on the 15th and not on the 13th the fish was put right in your hand and you had it?—Because it was not so. Because it was not so.

When did you buy fish before the 15th?—To tell you, I bought it two or three weeks before. I buy fish on Thursday and eat it on Friday." [1589]

7. MELVIN CORL, a fisherman of Plymouth, had known Vanzetti since 1915. Corl said he had talked with Vanzetti on the afternoon of April 15th for about an hour and a half, Corl was painting his boat at the time. He also heard Frank Jesse talk to Vanzetti on that day about an automobile. Corl fixed the date of his conversation with Vanzetti by reference to the date when he put his boat into the water, which was his wife's birthday:

"—On account of painting my boat, and I was going to put it in the following day, but it was not completed and I put it in on the 17th, my wife's birthday.

Whether or not that was the first day you had started painting your boat?—No, I was painting,—I had been working on it practically the whole week.

When did you put the boat in the water?—April 17.

Does that date mean anything to you?—It was my wife's birthday; and I also towed a boat from Duxbury on that date." [1549]

On cross-examination Corl said he remembered his wife's having remarked that he put the boat in the water on her birthday [1550]. He could not remember anybody whom he had seen while painting his boat except Jesse and Holmes [1551], nor could he remember what he had done on a number of specified dates [1552, 1553] except to say: "I am on the water most every day."

On redirect-examination Corl said Joseph Morey was one of the men who had gone with him to Duxbury. [1554]

MRS. CORL remembered that her husband had been painting the boat some days before her birthday, the 17th [1671]. On cross-examination she thought she had seen the boat on the Thursday night [1672]. She was sure she had not gone down to see it on Friday night because she usually went to the movies on Friday [1673, 1674]. On redirect-examination she testified her husband had told her he had to tow a boat for Mr. Morey that Saturday afternoon. [1674]

JOSEPH MOREY, a cloth inspector of Plymouth, testified that on April 17th, 1920, Corl had towed a boat which Morey had bought at South Duxbury and that Corl's own boat was at the time newly painted. [1674, 1675]

On cross-examination Morey fixed this date as the Saturday before the holiday (meaning Patriots' Day, the 19th). His attention had first been called to this matter of the date on the way to court:

"Did you remember it right off?—No. I did not.

Did somebody tell you what it was?—Yes.

Who told you?—Mrs. Corl and I talked it over.

MR. KATZMANN. That is all.

THE WITNESS. And decided that was the date.

You decided that was the day?—We weren't sure of it.

You weren't sure?—She wasn't sure.

She wasn't sure?—Yes.

MR. KATZMANN. That is all " [1676]

8. HOLMES did not testify, but FRANK JESSE, the boat builder, who had known Vanzetti for about eight years, remembered that while Vanzetti was on the shore where Corl was painting a boat, he had talked with him about an automobile. But he could not fix the day, other than that it was in the Spring. [1586]

b. Discussion by Counsel and the Judge

In summation Mr. Moore did not discuss this alibi, but Mr. McAnarney referred to the witnesses as only "the poor people he traveled

with and who know him." He described Rosen as "funny as could be . . . He pretty near made an iron proof safe there." [2171]

Mr. Katzmann in his argument to the jury wondered whether counsel had no confidence in Vanzetti's alibi since, in their opening, they had failed to mention where Vanzetti had been on April 15th.¹ This, although literally true, was a misleading statement, as Mr. Callahan, who opened for Sacco, had said the defendants would explain what they had been doing throughout the day of April 15th. [943]

In addition to those general comments on the alibis which have been referred to in discussing that of Sacco, Mr. Katzmann described Mrs. Brini as "a stock, convenient and ready witness as well as friend" [2192]. He ridiculed the recollections of Guidobone and Corl, asking "if it is necessary for any married man to remember his wife's birthday," [2194] and read Morey's testimony to the effect that Mrs. Corl had not been sure of the date, saying she had been seeking to make him "fabricate the story that it was on the 17th" [2195]. Mr. Katzmann also dealt at some length with Rosen and pointed out that Mrs. Brini had contradicted Rosen's statement that he sold her some cloth. [2196]

No special reference to Vanzetti's alibi was made in the Judge's charge, in his opinion of December 24th, 1921, or in subsequent opinions. On the appeal from the judgment of conviction the Judge's refusal to admit any evidence of the nurses' record was upheld on the ground that such a record would not have been admissible against the defendants and could, therefore, not be admitted in their favor. [4335]

c. Before the Lowell Committee

Rosen the peddler testified he thought Mr. Katzmann had been unfair to him. "He was trying to catch me." Rosen went over the testimony he had given at the trial [5254] and said Katzmann had kept him on the stand all afternoon [5255]. President Lowell asked him if he wanted to change any of the testimony he had given at the trial to which he answered in the negative [5256]. He was the only witness who was examined with reference to the alibi.

Governor Fuller said nothing about Vanzetti's alibi in his report, but the Lowell Committee stated:

"The alibi of Vanzetti is decidedly weak. One of the witnesses, Rosen, seems to the Committee to have been shown by the cross-examination to be lying at the trial; another, Mrs. Brini, had sworn to an alibi for him in the Bridgewater case, and two more of the witnesses did not seem certain of the date until they had talked it over." [5378y]

These two other witnesses, evidently Morey and Mrs. Corl, did not testify as to any event of April 15th, but merely corroborated Corl's fixing April 17th as the date when he towed a boat. Mrs. Brini had not sworn to an alibi for Vanzetti in the Bridgewater case. She had testified

¹ See pp. 81, 82.

only to having seen him the evening before the crime and the evening after [305*]. It is, of course, true that at the Dedham trial a stipulation was made which intimated she had been an alibi witness in the earlier case, but the fact is otherwise.¹

III. *Summary*

In his summation Mr. Katzmann argued that there was no logical connection between a witness' meeting one of the defendants and an unrelated event, unquestioned as the occurrence of this event might be, by reference to which he claimed he had fixed the date of the encounter. He meant, for example, that Guadagni's claim that he saw Sacco on April 15th gained no credibility as to the accuracy of the date from his linking that meeting with the dinner given editor Williams on the fifteenth. For what, argued Katzmann, had the dinner and seeing Sacco to do with each other? The implication was that a man might have met Sacco on another day and confused the day in his recollection with that of the dinner. In the same way Katzmann disputed the value of the testimony of the witness Williams in so far as he fixed his meeting with Sacco by reference to an undoubted visit to his doctor on the date in question. The District Attorney was undoubtedly right in asserting that the testimony of these witnesses would have gained in credibility had they been able to connect their recollection of seeing Sacco with the actual event by which they determined the date; had Guadagni met Sacco at the banquet, had Williams seen him in the doctor's office, the plausibility of their testimony would have taken on greater weight than Mr. Katzmann was willing, as it stood, to accord it.

Inquiry should be made nevertheless into the weight or psychological importance of the event by which a witness fixes a date as well as into that event's connection with the person seen. Some events color a day, so that the day stands out and with it its other, minor happenings. So curious are the ways of human memory that no rule can be laid down by which to test the value to the individual of associations and thereby the plausibility of memories. One man remembers an event because the picture of a place stays vividly in his mind, another bases his association on the sense of taste or smell, still another has a memory fixed by speech or music.

The witnesses in this case fixed April 15th as the date of their respective encounters with either Sacco or Vanzetti in various ways. Monello recalled it by reference to a play he saw a few days later; Guadagni, Bosco and Dentamore related their recollection to the dinner given the editor; Williams relied on an advertisement he had solicited on that day as well as on his visit to the doctor; Andrower remembered the incident because he was amused at the size of Sacco's passport picture and the date because he happened to have noticed it on a calendar while looking at the picture.

¹ See p. 194.

Both Ricci and Rosen marked the day because on it they heard of the crime at South Braintree; Rosen remembered it for another reason too, the fact that his wife had on the same day paid a poll tax. Mrs. Brini and her daughter said the fifteenth was the day on which a nurse had visited them; Guidobone remembered it was a Thursday because, as usual, he obtained fish to eat on the Friday, and fixed the date because this happened to be the Thursday before he went to the hospital for an operation. Corl said he was working on his boat for several days, finishing the work on his wife's birthday, and that this was two days before the birthday.

Most of the witnesses, it will be seen, were able to connect their memory of having seen Sacco or Vanzetti with some definitely ascertainable event; others tied up their recollections with a date entered in a book or with a glance at a calendar. In regard to each of these witnesses a mistake as to the date is excluded. Either they told the truth and told it accurately, or they were lying. The value of their testimony depends, however, on the credibility of their statements that they saw the defendant when they said they did. This is true even despite his written record of the witness Affe, for his records were not kept in such regular way as to have probative value without aid from his testimony. In judging the credibility of these people account must be taken, too, of the friendship many of them felt for the defendant. Such is not the case in regard to Williams, Dentamore, Bosco, Andrower or even, perhaps, Affe. Another element to be evaluated in weighing this testimony is the length of time which elapsed between the events a witness recalls and the occasion on which he was first requested to bring them to mind. The duration of this lapse of time is not always evident from the record. Williams had been asked to recall the events of April 15th shortly after Sacco's arrest, probably within a month of the events themselves; Andrower had been shown Sacco's picture some time before May 22d, the day on which he returned to Italy. It is likely that all the witnesses had their recollections refreshed sufficiently close to April 15th for it to be plausible that they should associate their recollection of the defendant with the event of the day which enabled them to fix the date.

The alibi for Sacco is inherently stronger than that for Vanzetti, partly because of the difference in the character of the two sets of witnesses, and partly because the associations on which the witnesses for Sacco relied have greater plausibility than have those used by Vanzetti's supporters. Sacco's alibi is additionally strengthened by his having picked out Hayes as a fellow passenger in the train returning from Boston on the afternoon of April 15th. The exact time when that train left Boston was not fixed, nor was its exact arrival in Stoughton determined. Both Hayes and Sacco agreed that it arrived some time after five o'clock. The train, partly a local, took about forty minutes to make the trip. It is, therefore, likely that it left Boston at about four-fifteen or four-thirty, a little over an hour after the murders at South Braintree, twelve miles away.

That Hayes was on this late afternoon train on the fifteenth can hardly

be open to question unless he be suspected of improper complicity with the defense. He was a one time surveyor of highways, resident for thirty-three years in Stoughton. That he should have wilfully committed perjury on Sacco's behalf is unlikely. Any suggestion that he mistook the date is apparently answered by the receipt on April 15th of money which he used that day in Boston, and by the entry of that receipt in a book produced in court.

Explanations of the Hayes incident not inconsistent with Sacco's guilt nevertheless exist. Sacco may not have been on the train himself and may have learned through outside sources that Hayes had been in Boston that day, or he may even have seen him leaving the train at the Stoughton station that evening. Or else, after escaping from the scene of the crime, Sacco may have managed to board the train, either in Boston or at one of the way stations. There was time for this to have occurred, but it is hard to see what motive Sacco could have had for doing so. To have boarded the train at a way station would have subjected him and whoever took him there to the risk of observation and the consequent destruction of any planned alibi. It is unlikely that he was in some unaccounted manner rushed to Boston after the escape from the scene of the crime in order to get a train back to Stoughton, itself not far from the course taken by the fleeing car. Moreover if Sacco was for some reason put on that train one would suppose that he would have made an effort to have himself noticed by the conductor or some one else on the train. No bandits would have gone to the trouble and risk involved in getting one of their number to this train unless in the expectation of thereby supporting an alibi and they would not build up an alibi that could be proved only on the chance finding again of a perfect stranger casually noticed on the train. The supposition that Sacco was both on the train with Hayes and at the scene of the crime, while possible in point of time, is improbable for lack of motive.

Equally improbable is the first supposition, that Sacco was not on the train at all. It cannot be supposed that he would have ventured a guess on Hayes' location in the car unless he had actually seen him there. It will be recalled that Hayes and Sacco agreed in their testimony as to where Hayes had been seated, that Hayes had not heard Sacco give his testimony and that Hayes said he had not been asked about his position in the car before his examination in court. It may seem remarkable that, after an interval of fourteen months, Hayes should have remembered his position in the car, but there was no reason why he should have said he remembered unless that was the fact. That Sacco and he should have so completely agreed if they had not in fact been on the train together would be an amazing coincidence, hardly conceivable except on the supposition of Hayes' complicity with the defense.

That Sacco's alibi was considered a strong one is evident from the attempt of the Lowell Committee to break down one of its chief supports—the testimony of the witnesses who connected their recollection of

having seen Sacco with the dinner to the editor Williams. It is, perhaps, significant that although the Committee in its report took up nearly all the controversial matters in the case, including Vanzetti's alibi, it did not discuss Sacco's. The Committee remarked merely that in view of all the evidence it did not believe that Sacco was in Boston on April 15th. There can hardly be any doubt that if he was there on that day he was innocent of the crime.

VII

THE MEDEIROS CONFESSION

IN November of 1925 Celestino Medeiros,¹ a young Portuguese, was in Dedham jail (where Sacco, too, was confined) awaiting the outcome of his appeal from a conviction for murder committed during a hold-up at Wrentham in 1924. [4400, 4404] .

On November 16th he delivered to a jail runner an envelope addressed to the *Boston American* which contained a paper in which he confessed his participation in the South Braintree crime and exculpated Sacco and Vanzetti [4497, 4574]. That envelope was apparently intercepted by Deputy Sheriff Curtis and never allowed to reach its destination.

Two days later Medeiros gave the same runner a paper for Sacco; this one reached its destination. It read as follows:

"I hear by confess to being in the south Braintree shoe company crime and Sacco and Vanzetti was not in said crime." [4399]

As soon as Mr. Thompson learned of the existence of this paper he interviewed Medeiros in jail, took notes of the man's statement and sent a copy of his notes to Assistant District Attorney Ranney [4400, 4543, 4715]. Thompson told Mr. Ranney that he intended basing a motion for a new trial for Sacco and Vanzetti upon this confession. It was agreed that it would be unfair to Medeiros to make such a motion as long as there was a possibility of his being given a new trial as the result of the pending appeal. The appeal having been successful, Medeiros in May, 1926, was tried a second time and again convicted [4537]. Thereupon Mr. Thompson prepared both an affidavit for Medeiros to sign and other papers for use on his projected motion.

At about the same time Mr. Thompson suggested in writing to both the Attorney General of Massachusetts and Mr. Wilbar, the District Attorney, that all important witnesses be interviewed jointly by representatives of both sides and that their answers be taken down stenographically, so as to prevent the case from degenerating into a "contest of affidavits." The Attorney General approved this suggestion, but Mr. Wilbar refused to accept it. [4536, 4537].

In his affidavit MEDEIROS recounted that, early on the morning of April 15th, 1920, he had been picked up at his home in Providence by four Italians; that they had driven in a Hudson automobile to South Boston to get information useful to them in connection with the proposed hold-up; and that from there they had gone to Randolph where they changed to a

¹ In some places given as: Madeiros

Buick car. Medeiros said in the party besides himself were men who had been engaged in robbing freight cars in Providence. He refused to mention names except to say that one of the men was called Mike and another, Bill. [4417, 4418]

Mr. Thompson obtained an affidavit from JAMES F. WEEKS, who had been associated with Medeiros in the Wrentham hold-up [4400]. Weeks said Medeiros had on numerous occasions told him that the South Braintree job had been done by the Joe Morelli gang. According to Weeks, this gang consisted of five Morelli brothers, Joe, Mike, Pasquale, Fred and Frank, and Bibber, or Billy, Barone [4401]. Weeks concluded by stating:

"Medeiros often talked with me about the Sacco and Vanzetti case. He said 'Those men have plenty of money to get out with'; but he also said that if they ever got convicted, he would come to the front before he would see them go to the chair.

"I have made this statement to Mr. Thompson voluntarily, and upon the advice of the Deputy Warden to tell the truth. I know that Sacco and Vanzetti had nothing whatever to do with the South Braintree payroll robbery. It is well known and has long been well known among a certain crowd who did that job. Before I made this statement I was informed and believed that Medeiros had handed to Sacco in the Dedham Jail a paper confessing that he was in the South Braintree job. I do not remember ever having met any of the family of Medeiros. I did not come to know Medeiros until after the South Braintree job." [4403]

Medeiros, although informed of Weeks' affidavit, refused either to admit or to deny that the others associated with him at South Braintree were the members of the Morelli gang [4532]. At one time, however, according to Mr. Thompson, he had said it might be the Morellis [4536]. When asked later about this statement, he refused to answer. [4667]

BARNEY B. MONTERIO made an affidavit to the effect that Medeiros had told him he had been in the South Braintree crime:

"One day while he was working for me he told me he was interested in the South Braintree affair. At another time when he was reading in the paper something about the Sacco-Vanzetti case—I do not think it was the trial, but something that happened after the trial—he said 'I know more about that than Sacco and Vanzetti do.' On another occasion when he was driving me in a motor car to New Bedford he asked me what I would do if a bunch double-crossed me, and said that a bunch double-crossed him in the South Braintree job, and he also said that Sacco and Vanzetti knew nothing about that job. He never told me whether he had succeeded in getting any money out of the gang that had double-crossed him. He did not tell me whether he meant by that that they had not paid him anything, or meant that they had not paid him enough. He then told me in so many words that he was in the gang that committed the South Braintree crime, but he never told me who the other members of the gang were." [4474]

His wife, MAY MONTERIO, said of a visit she paid to Medeiros in jail in June, 1926:

"I then said, 'Fred, is it really true, the statement you have made about the South Braintree murders, and were you really in it,' and he said, 'Yes, it is the truth, I was in it.' I also asked him where were the jewels that he had told me about some time ago, and he said they were in Brownville, Texas, and he also said that he had some money down there. He didn't give me any more particulars. He said that he would like to save Sacco and Vanzetti because he knew they were perfectly innocent, and he felt sorry for Sacco because he had seen his wife and two children go by but he said he hated to bring others into it where there were more than two; and he said 'If I cannot save Sacco and Vanzetti by my own confession, why should I bring four or five others into it?' I said 'It is an awful thing to see two innocent men lose their lives and the guilty escape.' He said 'Yes I know it.' I said, 'You know they have got the Morrell boys.' At that time he was lying down resting on his elbow and when I said that he raised himself suddenly and said 'Have they got them?' and I said 'Yes,' and he said 'With the exception of Joe, who got twelve years and is still in prison, but he has served six and will get his parole this year.' I then said that I understood they couldn't hold them for lack of evidence, and he asked me how long they held them, and I said I didn't know, but I thought they had held them for a while as suspicious persons, and that I had seen something in the Providence paper about their having them in the police station." [4477]

Joe Morelli was in fact paroled shortly after and is now at liberty.

The prosecution claimed that Medeiros made his first confession after having seen a copy of the financial report of the Sacco-Vanzetti Defense Committee which showed the expenditure of a very large sum of money [4574]. This contention was disputed both by the runner who had received the confession [4497] and by Medeiros himself. [4662]

On the hearing of the motion a large number of affidavits dealing with further details of the statements made by Medeiros and by Weeks and discussing the activities of the Morelli gang was filed by both sides. One of these affidavits was that of JOHN J. RICHARDS, a former member of the Rhode Island legislature and Adjutant General of that state, in 1920 United States Marshal for the District of Rhode Island and active in the prosecution of the Morellis. He named, in addition to those already mentioned as members of the Morelli gang, Tony Mancini [4448] and Stephen Benkosky, apparently known as Steve the Pole. [4450, 4524]

Pictures of some of the members of the Morelli gang were shown to various persons who had been witnesses at the trial of Sacco and Vanzetti. Wade [4470] and Burke [4484] picked out Joe Morelli as resembling the man they had seen at South Braintree. Each of them said he looked like Sacco. According to a defense investigator Mary Splaine also said there was a resemblance [4471]. Dominic Di Bona, Falcone, Iscorla, Gatti and Antonello all thought the picture of Joe Morelli looked just like Sacco [4465]. Donata Di Bona stated that the picture of Antonio Mancini looked like the man he had seen sitting next the driver of the car and that a picture of Steve Benkosky resembled the driver himself [4565]. Miss Kennedy and Mrs. Kelly (formerly Miss Hayes) also

stated that Benkosky's face resembled the driver. [4510, 4513]

MARY SPLAINE, (then Mrs. Williams), made an affidavit for the prosecution in which she denied the statement attributed to her by the investigator:

"Then he said he wanted to show me some pictures, and he handed me some pictures at the same time. While I was looking at the pictures he made this remark, 'That one impresses you.' I had four pictures in my hand. To that remark 'That one impresses you,' I made no reply. I went into the house then and came back shortly, and I then asked him who the man was, and I also said that I could turn the picture over and see for myself but I would just as soon have him read it to me. He then turned the picture over and read, 'Joseph Morrell,' and I looked [4606] on the back while he was reading it. I said, 'Mr. Carter, if you had seen Sacco's picture in the papers as often as it has been, and this one along side of it, you would admit there was a resemblance, but from the picture you can't tell whether the man has the same complexion that Sacco has, neither can you tell whether he has the same large hand.' To that remark Mr. Carter said, 'Yes, he has a hand like a ham.' I told him that from the two pictures I wouldn't be willing to say that I was mistaken until I knew other characteristics about the man's looks. I said I wouldn't say from looking at the picture that I was mistaken, because I couldn't tell from the picture that this other man had the same distinctive features that Sacco has, referring to the complexion of the man and the large hand, that the picture did not show.

"Then he said, 'I think, Mrs. Williams, that you are honestly mistaken.' I examined the four pictures, but made a more particular examination of the picture that Mr. Carter stated was Joseph Morrell.

"I did not say at any time, 'That is a picture of the man who did the shooting, it is a picture of Sacco, isn't it?' I did not ask him several times whether the picture was a picture of Sacco.

"I did not say, 'This picture full view and side view, very strongly represents the man I identified as Sacco.'

"I told him that it would be impossible for me to identify any man from a rogue's gallery picture and that I would have to see the man myself.

"In discussing the picture of Morrell Mr. Carter stated that he was a dark complexioned man and I said that Sacco was not a dark complexioned man but had a sort of olive green complexion. Mr. Carter then said, 'All "wops" look alike,' and I said, 'Oh, no.' " [4607]

It appeared from numerous affidavits that in April, 1920, the Morelli gang had been under indictment in Providence in connection with thefts of shoe shipments from Slater & Morrill and from Rice & Hutchins [4414, 4437]. All its members with the exception of Fred Morelli and B. Barone were concededly at liberty on April 15th, 1920 [4367]. They were well known to the police of Providence and of New Bedford as a gang of vicious characters [4420, 4426, 4448]. When their trial took place in Providence in May, 1920, it resulted in conviction. [4426]

Suspicious acts on the part of Frank Morelli on April 24th, 1920, were noticed by a New Bedford police officer, ELLSWORTH C. JACOBS. Jacobs had seen Mike Morelli driving a new Buick touring car a few days be-

fore April 15th and had noted the license number. On the 15th he again saw the car, although not its occupants, at about 5:30. On the 24th he noticed a Cole car having the same license number as the Buick. On going into the restaurant outside which it was standing, he found Mike's brother, Frank, with some other Italians:

"They were extremely nervous at my approach. One of the Italians whom I remember distinctly was a short heavyset man with a wide, square face, high cheek bones, smooth shaven, dark brown hair, thirty-five to forty years of age, weighing about one hundred seventy pounds, and probably about five feet, six or seven inches in height. I recall him distinctly because when I approached the table he reached for his hip pocket which made me believe that he was going to draw a gun. I was unarmed at the [4420] time and feared violence. I can never forget that man's face. When I approached, Frank Morrell immediately spoke up and asked why I was picking on him all the time and what I wanted with him. Frank Morrell did not hang around New Bedford as much as Mike. I am informed that he was one of the four other brothers indicted in Providence. I asked Frank how it happened that the Cole car below had the same number as the new Buick which I had seen Mike driving. He replied he was in the automobile business and that the plate was a dealer's plate which he transferred from one car to another.

"I never saw the Buick car again after April 15, 1920, nor have I seen Frank Morrell since approximately that time. Mike Morrell remained in New Bedford for some time, possibly a year, when presumably he left and I have not seen him since.

"At the time of the South Braintree murder and payroll robbery, I suspected the Morrells and discussed my suspicions with then Inspector Pieracini who seemed to share them. However, as I had no definite evidence I dropped the matter after the arrest of Sacco and Vanzetti.

A 32 calibre Colt pistol had been found in Joe Morelli's house in the spring of 1920 [4424]. Mancini had had a 7.65 calibre pistol, which corresponds to a 32 calibre American make of pistol [4558]. He had been arrested in New York in February, 1921, on a charge of murder to which he pleaded guilty in the second degree. He is still in Auburn prison. The police who took the pistol recorded it as a "Star." Mr. Burns submitted an affidavit claiming that a "Steyr" is often erroneously named a "Star" [4566]. Mr. Van Amburgh said Star and Steyr were both existing makes of foreign pistol. [4615].

An affidavit from ALBERT L. CARPENTER gave the substance of a conversation he had had with one Moller, formerly a fellow prisoner of Joe Morelli's in Atlanta, to the effect that, after a visit made to the prison in 1921 or 1922 by Mr. Moore, an alibi had been arranged by Morelli and others in the prison to account for their whereabouts on April 15th, 1920:

"Moller's language to me, of which I took notes, was as follows:

"That I was to testify that on the night particularly of April fifteenth I was playing poker with Paul Martini and Jake Luban and Joe Morelli, and

myself. That the game lasted the entire night. That prior to that time and after I had been living at the American Lodging House, Forty-sixth Street, which was then being run by the wife of Luban. I had agreed to testify to this alibi as had Morelli. Morelli is now a prisoner in the Mountville Prison, in West Virginia. His number is 2347. His home address is 25 Marietta Street, Providence, Rhode Island.'

"Moller told me that these three men had been acquainted before they were in Atlanta, and he also told me that although the talk about the alibi seemed to be partly for the benefit of Luban and Martini, it was, in his opinion, really for the benefit of Joe Morelli, who did not wish Moller to suspect his own connection with the South Braintree crime. Moller did not tell me what ground he had for this statement." [4468]

JOE MORELLI was interviewed at Leavenworth Prison by Mr. Ehrmann and Mr. Richards, the former United States marshal. After Richards explained to Morelli that he and others had been charged with complicity in the Braintree murders, Morelli said he had always worked alone. The remainder of the interview, as told in a joint affidavit of Ehrmann and Richards, follows:

"When Richards completed his statement of the charge as made in Massachusetts against Morelli, the latter said this was an attempt to put him away, and was another frame-up like the charge for which he was serving twelve years. Richards then said that Morelli knew better than that, and stated how at the end of the trial Morelli suddenly sprang a frame-up plea, and later claimed that the Judge had not given him a fair trial, that the District Attorney had received \$5000 and the Marshall had participated in the profits. Richards then added that he knew Morelli since he was a boy and started to tell the warden of his record in Providence, when Morelli appeared to become greatly excited, crying out several times that 'he was trying to spoil his record with his warden.' The warden then interposed, stating that the interview must be conducted quietly without heated argument and asked Richards how he would like to have the remarks made about him which Richards was making about Morelli in discussing Morelli's record. The warden further stated that Morelli did not have to say anything unless he cared to.

"Richards then asked Morelli whether he had heard of Sacco and Vanzetti and after the names were repeated several times Morelli asked whether these were the men he read about in the papers. He then repeated the name Sacco twice and said to see Mancini about that. Richards then asked Morelli whether he knew of the Rice and Hutchins Shoe Factory, South Braintree. Morelli said he never heard of the factory. Richards then asked whether Morelli did not know that four counts of the indictment against him were for stealing shipments of the Rice and Hutchins Shoe Factory. Morelli said there were fifteen counts, that it was six years ago and he couldn't remember what was in them.

"Mr. Ehrmann then asked whether Morelli had heard of Jimmie Weeks or Croft. Morelli said he never had. Ehrmann then asked whether he had stolen whiskey with Croft or Weeks, and Morelli said he had never been in

a whiskey job. Ehrmann suggested that the whiskey may have turned out to be vinegar on which Morelli made no comment.

"At the time of Morelli's outburst that Richards was trying to ruin his record with his warden, Ehrmann suggested that Morelli had something more serious to think about. Morelli then proclaimed that there was a just God who knew of the wrongs done against him and who would judge him. Ehrmann remarked that it might come to that. Morelli said to prove the charges against him and send him to the electric chair [4454]. Morelli stated he had nothing to say and the warden stated that if Morelli declined to talk the interview was over. Ehrmann then outlined to the warden in Morelli's presence the substance of the evidence against Morelli, leaving out the names of witnesses and the names of Morelli's alleged accomplices. In concluding, Ehrmann stated that there were hundreds of thousands of people who believed Sacco and Vanzetti innocent, and that if Morelli, whether he did the actual shooting or not, knew the facts and aided in proving their innocence, that he would earn the gratitude of all these people. It was an opportunity for Morelli, if he knew anything, to do a most praiseworthy act. If, however, Morelli did not make a statement until he was publicly accused of the crime, he would not get the credit for it. Ehrmann then said that he and Richards would be at the Westgate Hotel, Kansas City, until the next day if Morelli wanted to say anything. Morelli said he had nothing to say and would have nothing to say the next day. Thereupon the interview was closed.

"During the interview, with the exception of the time when Morelli cried out about spoiling his record with his warden, Morelli's manner was defiant and sneery. When it was apparent that the interview was over the warden did not ask Morelli to leave, but Richards and Ehrmann left, Morelli and the warden remaining in the office." [4455]

Morelli was subsequently interviewed by a Massachusetts detective, Joseph F. Ferrari. His statement was taken down stenographically. Morelli denied knowledge of Medeiros and, when shown a photograph of the latter, said he had never seen him. He positively denied having had anything to do with the Braintree crimes [4603]. Asked where he was on April 15th, 1920, he said: "I went from my home to my lawyer's office then to Jones' Restaurant, hang around and then drive home; that's my recollection of it." He was unable to name any one who might remember having seen him on that day, except that he said about Daniel E. Geary, his lawyer: "If he is any kind of a man he ought to be able to say that I was in and out of his office during the months of March, April and May of that year, going over my case" [4604]. Mr. Geary told Mr. Ranney that he was unable from his records to state where Joe Morelli had been on that date but that he had been in his office almost daily. [4602]

Asked about his interview with Richards, Morelli said:

"Who were they, if you know?—One was formerly U. S. Marshal, John J. Richards that sent me away for the twelve years for interstate the other was a man whom he called Robinson (and whom now I find his name is Herbert B. Ehrmann).

Will you state what they said to you and what you said to them?—They told me about a murder case that happened in Boston after they explained to me which murder it was I told them I read it in the paper. John J. Richards took a letter out of his pocket stating that he had evidence against me that I done this killing and wanted me to sign a confession to it. I told him I wouldn't do it because I didn't know anything about it. He says it is best for you to sign it; it will make it easier for you. I told him I would not do it; well he says the Boston Police is going to indict you for that murder next week. I says thanks, then he tried to bulldoze with the Warden telling the Warden what a bad fellow I was and so on and so forth. I told the Warden I refused to speak with or see them any longer. Then the warden said he wouldn't stand for any bulldozing and trying to get me to sign something I wouldn't do. Mr. Robinson also tried to get me to sign a confession for that murder [4604] and I told him I wouldn't do it because I didn't know anything about it, only what I read in the papers. Said I would be a good fellow if you sign a confession and save these two fellows battling for life. I says I would be a poor fool to take the blame for something I didn't do to save the lives of somebody else." [4605]

Three of the other Morelli brothers, Frank, Pasquale and Fred, were interviewed by the District Attorney and his assistant but not by anyone on behalf of the defendants. They all denied both participation in the crime and knowledge of Medeiros and stated that Joe Morelli had been in jail during the entire month of April, 1920 [4583]. This last statement was, of course, false; for the court records and also the admissions of the District Attorney show that Joe Morelli was at liberty on April 15th, 1920.

On June 28th, 1926, in the presence of counsel for both sides MEDEIROS was examined at length in jail. He persistently refused to name his associates or answer questions which he said would result in such disclosure, although in a large number of instances there was no relation between the questions he refused to answer and the identity of those associates. [4627, 4629, 4635, 4636, 4640, 4651, 4707, 4709]:

"I am not asking you to give me the names of the men who went with you on the South Braintree job. I am only asking you if you will tell me whether you recognize certain pictures that I show you. I am not asking whether these were the men who went with you on the South Braintree job.

I ask you to look at this photograph and tell me if you ever saw that individual?—I refuse to say.

What is your reason for refusing to answer that question?—Private reasons.

You would not be willing to swear you did not know him?—I refuse to say.

[Rogues' gallery photograph of Joseph Morell is marked 'Exhibit 2.']
[4627] . . .

"Your reason is, is it not, that you do not care to say anything here which might in any way implicate anybody else?—Yes, sir. [4628] . . .

Isn't it the real truth of this case that these men did not completely double-cross you but that they did not give you as much money as you thought you ought to have? Isn't that the honest truth?—I refuse to say as to that.

Is your reason for refusing to say that you are afraid it will incriminate somebody else?—I refuse to say.

You have made a clean breast of it so far as yourself. Nothing [4635] you can say about this matter will make it any worse. With that in mind and realizing the great importance of the actual truth, I put it to you isn't that the honest truth of this case?—Well, I refuse to say. I wouldn't care for you to trace this money where it came from.

You mean you have a fear that if you should give a truthful answer to that question I might trace the money back into the hands of these Italians?—Yes; it is a reason. [4636] . . .

You said you went there but they didn't come. That is not true. They did come, didn't they?—I refuse to say.

Did you put that statement in,—'I went there but they didn't come,' in order to put me off the track in identifying these people?—I refuse to say.

Did you put that statement there for the same reason that you told me one lived on South Main Street and the other lived on North Main Street?—Practically the same reason.

Is it a fact that while you are willing to tell the truth about this case so far as you personally are concerned, regardless of how much it implicates you personally, you are not willing to mention any fact which might lead to the discovery of who your associates were? Is that your attitude?—That is.

If in answering these questions, you think you see any question [4640] which might give the government or myself a chance to identify the other men, you are going to refuse to answer that?—Yes, sir. [4641] . . .

It has a very great bearing because you will bear in mind that somebody has to claim that this testimony is true and somebody has to claim that it is false. I am trying to test the reliability of your statements and you are not doing much to help me.—I can't help that.

You can't do anybody any harm if you answer that question. You ought not to take advantage of the fact that we cannot compel you to answer, when a case of this importance is on trial.

MR. RANNEY: I object to the statement of counsel.

—I refuse to answer.

Outside of all question of murder, thievery and everything else, don't you know that Joe Morell was in 1920 the leader of the Morell gang? I think you ought to be willing to go that far in answering?—I don't care

to bring the brothers in this at all.

Why not?—Just because I don't care.

Why does that question bring the Morells into any crime?

MR. RANNEY: I wish to state my objection to this colloquy between the witness and counsel.

Why should a question like that bring the Morells into the South Braintree crime,—whether Joe was not the leader of it? Why should that bring them into any crime?

MR. RANNEY. Objected to.

Why should that bring the Morells into any crime?—You being a lawyer and I being a fellow that have not got any education, I can't hardly answer your question.

I cannot deny your statement that I am a lawyer, and I do not know whether you have an education or not. I think that is a simple question. It does not require any deep knowledge to answer it and I do not see why it should bring the Morells into this crime or any other crime, for you to tell me, if you know, whether Joe was the leader of that gang or not. It seems to me if you are going to refuse to answer a question, you ought to be willing to say why.—I don't think I can answer this here question.

You have told Mr. Ranney that Mike was the leader of the gang. Did you mean that?—We wasn't talking about this here picture.

We will turn that picture right down on the table. You told Mr. Ranney that Mike was the leader of that gang. Was that true?—Yes; that was true.

Was Mike as old as that picture?—I don't care to bring the picture into this. [4708] . . .

Was Mike as old as Joe Morell?—Not quite as old.

You do know Joe Morell?—I don't care to answer this question.

Did you tell Mr. Ranney that Mike was the leader of that gang, for the purpose of throwing Mr. Ranney off the track so that he would not find out who the true leader was?—I don't care to answer these here questions.

Why did you tell Mr. Ranney that Mike was the leader of the gang if Joe was older than Mike?—I refuse to answer.

Have you been trying in any of your answers to Mr. Ranney to shield the Morell gang?—I refuse to answer.

Have you been trying to shield any crowd?—Yes.

You have?—Yes.

What answers have you given to Mr. Ranney for the purpose of shielding some crowd?—I refuse to answer.

Do you think that you have done all that you ought to do in a case like this where you say that you are guilty and Sacco and Vanzetti are perfectly innocent, when you refuse to answer questions as you have this afternoon?

MR. RANNEY. I object to that question.

MR. THOMPSON. I press it.

Do you think that you have done all you ought to do when you refuse to answer so many questions as you have this afternoon?—I refuse to answer this here question." [4709]

He described the man who drove the Buick car as slim, sickly, light-haired and not an Italian. He said he remembered nothing about the crime except that two fellows had gotten out, that there had been some shooting and that the men who came back to the car had carried a money bag:

"Tell us what happened while you stopped in South Braintree and when you were in the back seat?—This car stopped a little ways up and two fellows got out. A few blocks down—not a few blocks, about 100 feet down, they waited there.

At that time were you seated in the car?—I was in the back seat.

Then what happened?—After a while I was sitting in the seat and I heard some shooting and these fellows ran to the car.

Did they have anything in their hands?—They had a black bag.

Was that black bag something that had been carried down from Providence, or what was it?—I believe it was a money bag.

Was it one bag?—One bag.

Was it something they carried with them or something they robbed?—Something they stole.

Did you see any boxes of money there?—I don't recall; I was half scared to death; I didn't hardly know anything about it.

Could you see what was going on outside?—I suppose I could see but I couldn't keep it in mind, the condition I was in.

You were very much excited?—Yes.

Nervous?—Yes.

You were only a little over 18 years old at that time?—Yes. [4632] . . .

When you started on this South Braintree job did you know there was likely to be murder committed?—I did not.

What did they tell you was their intention about that?—They said they just had to show the gun and the man would give them the bag right away.

What did they say they wanted you to do?—I suppose to hold the crowd back.

Were the curtains down on this Buick car that came up with these men in it at the time this murder was committed?—The curtains were down.

Did that impede your view of what was going on?—I was in such condition that I couldn't hardly recall anything about this.

After the job was done and when the car was speeding off did you realize that murder had been committed?—Well, right away.

How did you learn that?—I was told; they told me they had shot a man.

Was that the man who was not an Italian who said that or one of the

Italians?—The fellow driving the car.

Were you sitting beside him at that time?—No.

Did they tell you how much money they thought they had got?—No; they didn't say.

What did they say to you about your share of the plunder?—In Providence they said there ought to be something close to \$4,000 or \$5,000 apiece." [4634]

Medeiros remembered that after changing from the Buick car to the Hudson, in some woods off Oak Street, in Randolph, they had stopped at a fork in the road to ask the way to Providence:

"Do you recall that just before you got to the Boston road something happened and that there was some delay?—There was a little delay at a fork in the road.

Just explain what happened then, without any suggestion from me at all?—There was a delay at the fork in the road, and one of the fellows got out and found out from somebody in the house there.

What did he want to find out?—Just which road to take.

To get where?—To go down Providence way.

Did you hear the conversation?—I didn't.

Was it a woman?—I don't know.

Did somebody come out of the house or open a window?—I believe a woman was in the yard; I couldn't see the woman.

It was some woman?—I think it was a woman.

Did the car come to a dead stop when this conversation was going on?—It came to a standstill for a few minutes.

I suppose by minutes you might mean seconds?—Yes, seconds.

Give us as nearly as you can what that conversation was?—There was no conversation. I don't think we were there long enough to have a conversation. He just asked which road went to Providence." [4643]

This recollection was confirmed by a statement made to Mr. Thompson by Mrs. Hewins. She lived at the corner of Oak and Orchard Streets in Randolph and had on the day of the crime seen a car driving into her yard, its occupants uncertain which way to go. She claimed the driver was Sacco and told Thompson she had been subpoenaed to attend the trial of Sacco and Vanzetti but had not been called as a witness. [4540]

Medeiros admitted having told falsehoods to two doctors sent by the prosecution for the purpose of passing on his sanity:

"Why did you tell these two doctors that you never knew they were accused?—I don't know why.

Just to throw them off the track?—I suppose so.

MR. RANNY. Objected to as leading.

MR. THOMPSON. I think a situation has developed so that I have a right to cross-examine, the witness having refused repeatedly to answer my questions. I think a situation has arisen that both at common law and under the statute gives me the right to cross-examine. . . .

—To tell you the truth, I told those doctors I wouldn't talk about the case at all, and they just asked me a few questions, just that they wouldn't tell anybody, just on account of insanity; they claimed they wanted to see if I was right in mind or something.

They were here to examine you to see if you were sane or insane?—Yes.

And in answering their questions were you paying any attention to whether you were telling them the truth or not?—I wasn't paying any attention at all. I didn't see no right they had to question me. [4660] . . .

—The doctors questioned me, and I didn't pay any attention to what they were questioning. They told me they were questioning me to see if I was insane. I couldn't see what right they had to question me.

Did you deliberately make false answers to their questions?—I just simply told them the first thing that came to my mind.

Some of the things which you told them were not the truth, were they?—They were not, no.

Was there any reason why you should not have told them the truth?—Well; I didn't see what right they had to question me in [4685] the first place, and I didn't see why I should be telling my business to everybody all over the country.

It is a fact that some of the answers which you made were not the truth?—Yes." [4686]

On cross-examination by Mr. Ranney, Medeiros admitted that a number of statements in his original affidavit were incorrect [4683]. He was asked about the guns carried by the other men in the gang, and said:

"—I didn't take no particular notice, but I think they had the same kind of guns I had.

38's?—38's, yes.

Automatics?—I believe they were automatics.

They were the same calibre that you had?—Yes." [4695]

He was unable to describe the scene of the crime or the surrounding country, but when asked if the car had gone down grade after the shooting, he answered that it had gone up grade [4688]. That, of course, was the correct answer. The cross-examination of Medeiros on this point follows:

You cannot draw us a sketch of South Braintree?—I can't.

You have no memory of how it looks there?—No, sir.

Why haven't you any memory of how it looks?—I wasn't in much of a condition to have a memory at the time.

You were drunk, were you?—Well, not real drunk; we had a few drinks.

You were 18 years old?—Yes.

And your eyesight was so that you could see objects of various kinds?—Well, I could see, yes.

What does South Braintree look like? What kind of a place is it?—To tell you the truth I don't know what it looks like.

How far away was the automobile that I understood you sat in when the actual shooting took place? How far were you in that automobile from the shooting?—I couldn't say how far it is. I would say probably a hundred feet.

In other words, somewhere in the vicinity of $33\frac{1}{3}$ yards or 35 yards?—I wouldn't say in yards.

Can you by looking out of this window fix on any object in the jail yard which would give you the approximate distance between the actual shooting and the place where your car was standing?

Mr. THOMPSON: I object to that on the ground that there is no evidence of whether the car was standing or moving.

—I tell you I didn't see the shooting.

Was your car standing still at the time the shooting took place?—I believe it was standing still yes.

How many men were in it at that time?—There was five men.

Five men in the car at the time the shooting took place?—Five men in the car.

Who was doing the shooting?—Two men doing the shooting.

Where were they in the car?—They were out of the car.

That made seven in the car at the immediate scene of the crime?—There were five of us.

How many men were in the car when the two men you say did the shooting, were outside?—There was two men in the car.

Were you in the front seat or the back seat?—Back seat. [4687]

Where was the other man sitting who was in the car at the time?—At the wheel.

Did the man who did the shooting run up to you after the shooting took place and jump into the car?—Yes, sir.

Did you go away in a direction away from the shooting?—Away from the shooting?

Yes.—Yes; we went away from the shooting.

Is it fair to say that the men who did the shooting ran to your car and jumped in?—While the car was going.

And you immediately went away from the shooting?—Yes.

You did not go back to the place where the shooting had taken place?—No, sir.

Was the street at that particular point a level street or was it graded? What was its slope or was there any slope?—I think there was a little slope.

Did you go down grade after the shooting occurred?—Up grade.

Did you look out of the car at all?—I don't recall that I did.

Was there a railway anywhere near there? I couldn't say.

Did you see any factories anywhere around there?—I couldn't say that I seen any factories.

Did you see any stores at the immediate scene of the shooting, where it took place?—I don't believe it was stores, but I can't say for sure.

Did you see any excavation work being done, any digging, any place

where there was any construction?—I don't recall that I did.

Was the place where you stopped your car in a thickly populated place or was it out in the country where there were not many houses?—There were houses there. I don't know how thickly populated it was. It was not country.

Were there any swamps right near there?—I couldn't say.

Was there any lake right near there?—I couldn't say.

Did you go across a railroad crossing?—I couldn't say we did.

Did you see any water tank there?—I couldn't say I did.

Was there any shooting after the men who had done the shooting got back into your car?—I don't think so." [4688]

Judge Thayer denied the motion because he did not believe Medeiros [4748]. He said of him:

"*First*: Madeiros is, without doubt, a crook, a thief, a robber, a liar, a rum-runner, a 'bouncer' in a house of ill-fame, a smuggler, and a man who has been convicted and sentenced to death for the murder of one Carpenter, who was cashier of the Wrentham Bank. An affidavit from a man of this type must be examined and scrutinized with the greatest possible care, caution and judgment before the verdict of a jury approved by the Supreme Judicial Court of this Commonwealth is set aside." [4726]

In his opinion he analyzed the affidavits with much particularity but not always correctly [4727-4747]. He said, for example, that Medeiros had lied to Weeks in placing Fred Morelli at the scene of the crime when Fred Morelli had at the time been in jail [4729]. It should be noted that Weeks never said Medeiros had told him Fred Morelli was present. Weeks in his affidavit had referred to Fred Morelli as one of the gang and had given him the nickname Butsy [4401]. He had also said Medeiros had told him Butsy participated in the crime [4402]. It was conceded by the prosecution that Butsy was not Fred's nickname, but Frank's [4375]. It is therefore clear that Medeiros told Weeks that Frank had participated in the crime and that Judge Thayer was incorrect in charging Medeiros with this lie.

The Judge laid a good deal of stress on Medeiros' inability to give details of the scene of the crime. [4735, 4736]

"Let us pursue this subject further with the object of showing whether Madeiros was, or was not, in the murder car. One would naturally think that if he was in the important event of killing two human beings he would know something about what took place, and what the place and the immediate vicinity looked like where the murders were committed. There are some things that even a murderer ought never to forget in an event of this kind. But Madeiros' mind seemed to be, on these matters, almost a perfect blank." [4736]

Some further observations made by Judge Thayer deserve notice:

"His failure to recall any of these things would seem to be more consistent with the fact that he was not there, rather than that fear benumbed his sight and his memory. Madeiros also affirmed that at the time he had

with him a .38 Colt automatic pistol. This does not seem to indicate much fear. He also said that the others had automatic pistols. If this is true, it would not seem to indicate that there could be much fear on the part of any of the gang. His co-murderer Weeks, in his interrogatories, said that he believed that Madeiros was capable of any crime. If this is true, it would not seem to indicate any fear on the part of Madeiros in the commission of any crime. . . . Counsel also said that Madeiros was qualified by age because it is a matter of common knowledge that murders and robberies are committed by boys under twenty years of age. But after counsel had qualified Madeiros' criminal tendencies to the highest degree, he (Madeiros) in almost the twinkling of an eye becomes a poor scared boy only eighteen years of age and an easy subject to the temptations of the Morelli Gang in order to account for his tremendous lapse of memory.

"Now, let us go a step further and ask: If Madeiros' statement of fear is true, why did the Morelli Gang desire to take a timid young man with them, on a fully-planned and intentional murder job? For the evidence conclusively established the fact that the deceased were shot down at sight and were not given even a chance. This Morelli Gang was a gang of thieves and bootleggers, of mature years and large experience in crime. There were in their gang eight or nine, which would seem to be a sufficient number without calling upon a timid young man whom they had known but a short time, to go with them on an intentional murder job. Joe Morelli and others of the Morelli Gang, who have signed affidavits, have affirmed that they never knew Madeiros in their lives. Even tho they are criminals, there would seem to be a semblance of truth to be attached to their statements, because there is no affidavit from any police officer or anybody else whose word would be considered reliable who affirmed that they ever saw with their own eyes Madeiros in the company of any of the Morelli Gang. Police authorities, who were constantly watching the Morelli Gang, would be pretty apt to know whether or not Madeiros ever was a member of that Gang. [4739] . . .

"Why, then, should he, already convicted of murder in the first degree and being absolutely safe as against the world, refuse to give the names of these men and answer a great many of the questions, if he was deeply anxious to save two men, whom, he says, he knew were innocent. It was argued that this refusal to give the names of this gang might have been due to the 'code of criminal ethics.' Is this true? On this question, Madeiros, according to the affidavits of Weeks and Drs. Cahoon and Thomas, told them that the Morelli Gang had 'double-crossed' him and he did not get a cent out of the South Braintree job. If this is true, then he must have had an enmity against the Morelli Gang and being safe as against the world, why did he refuse to give their names, if by doing it he could help save the two defendants, who he claimed were innocent, rather than safely guard the names of the real murderers." [4741]

Of the report of the Defense Committee he said:

"Would this account be of some assistance to Madeiros in his then condition? And what was that condition? He had no money and no friends and with the fate of death hanging over him, was it probable that he was looking for the prolongation of his own life? Can there be very much doubt that something was said to Madeiros about this exceedingly large sum that had been raised for these defendants? Can it be doubted but the amount

raised and expended was mentioned to Madeiros? Is it not quite likely that Madeiros desired, before he made his confession, to ascertain whether or not this large sum had been raised and expended, and, on this account sent for this report?

"Madeiros says he sent for this report out of curiosity. But, the important question would seem to be, Who pumped this curiosity into him? It did not come to him by intuition, but rather by the acquisition of [4745] knowledge conveyed to him by somebody else who was interested in the defense of these defendants. Was Madeiros given to understand that he would receive the same aid if he had the power of this organization behind him? Would not that report show him that there was such an organization?" [4746]

This opinion was severely criticized by defendants' counsel in their brief before the Supreme Judicial Court and many of its misstatements and errors of reasoning were referred to [4817-4820; 4826; 4833-4853]:

"And in general we think it may be said without exaggeration that the Judge ignores every agreed fact, every undisputed fact, and every statement in any affidavit, tending to establish the truth of Madeiros' confession or the contention of the defendants with reference to the Federal agents; seems to think it incumbent upon him to offset the general fairness of the Assistant District Attorney by advancing in behalf of the Government a great variety of untenable and unfair contentions; and in general assumes the attitude of an importunate advocate against the accused. And he further buttresses his arguments, as already pointed out, by statements of fact *inconsistent* with the agreed facts, by misstating the argument of defendants' counsel, and by discussing issues which the parties had agreed to eliminate." [4853]

The brief printed in parallel columns the following comparison between the defendants and the members of the Morelli gang:

"The strength of the defendants' case on the issue of the Medeiros confession and the supporting affidavits may be illustrated as follows:

	<i>Medeiros-Morelli</i>	<i>Sacco-Vanzetti</i>
<i>Character of accused.</i>	Typical gangsters and gunmen of the worst type.	One of them an industrious workman with a family and a savings bank deposit, and no previous criminal record. The other a fish peddler never before his arrest accused of crime. Both unpopular as pacifists and extreme radicals.
<i>Motive.</i>	Desperate need of funds for lawyer and bail before trial for serious Federal offense. Source of income through robbing freight cars blocked by U. S. Marshal and R.R. police.	Robbery for private gain alleged. No claim or evidence that either defendant ever received or had any part of the stolen money.

<i>"Opportunity to plan crime.</i>	Had been repeatedly stealing large shipments from Slater and Morrill and Rice and Hutchins of South Braintree after a member of the gang had 'spotted' them in that place.	None alleged.
<i>Accusation by confederate.</i>	Direct testimony of participant.	None. [4791]
<i>Identification by others.</i>	Opportunity restricted, but Joe, Mancini, and Benkosky identified from photographs by Government as well as defence witnesses. No available photographs of Mike or Frank. Undoubted resemblance of Joe Morelli to Sacco in many particulars.	Some identification of Sacco; very slight of Vanzetti at the scene of the murder. Identifications open not only to doubt, but to the gravest suspicion owing to unprecedented manner of displaying these defendants, previous identifications of other criminals by same witnesses, changes in stories, suppression of testimony, manifestly impossible details such as the man identified as Vanzetti using 'clear and unmistakable English,' and the man identified as Sacco having an unusually large hand.
<i>Alibi.</i>	Full of contradictions as to Morellis. None by Medeiros.	Testified to by many reputable witnesses.
<i>Consciousness of guilt.</i>	Alleged motion to draw gun on officer—uncontradicted. Falsehoods consistent with nothing but consciousness of guilt of crime charged. Confession by Medeiros.	Alleged motion to draw gun on officer—contradicted. Falsehoods explained by terror felt by radicals and draft evaders at time of persecution of 'reds' two days after murder or suicide of a friend ¹ while in the custody of Department of Justice officials.
<i>Bullets.</i>	One fired from pistol of type owned by Joe Morelli (Colt 32), and five from	One only claimed to have been fired by weapon of Sacco, and none by Van-

¹ Salsedo.

type owned by Mancini ('Star' or 'Steyr,' 765 mm.).

*Other
Corroborative
Matter.*

Morellis were American-born and could have used 'clear and unmistakable' English. *Every member of the murder party accounted for.* Unwillingness of Morelli lawyer to state anything tending to implicate his former clients in the South Braintree murders.

Stolen Money.

Medeiros' possession of \$2,800 immediately thereafter (about his 'split' of the total sum stolen).

*Attitude of
Authorities.*

Seriously offer statements and affidavits of Morellis denying participation in crime. Declined request of defendant's counsel to interview *all witnesses* jointly to avoid vulgar contest of affidavits. Declined to investigate.

zetti. Sharp disagreement of experts, but if real opinion of one of the Government's experts had been known at the time of the trial he would have proved a *defence witness*.¹ [4792]

Testimony shows that cap claimed to be Sacco's was *not* identified by Kelly, and effort to connect Vanzetti's popular make of revolver with Berardelli's supported by most remote type of evidence, including confused records of gun-shop offered by an ex-agent (unrevealed) of the Department of Justice.² Does not account for other members of the party.

None. On the contrary, when arrested, Sacco and Vanzetti, supposed to be in possession of over \$15,000, and ex-hypothesi, to be accomplished automobile thieves, were using street cars after an unsuccessful attempt to borrow a friend's³ six-year-old Overland.

Anti-Red excitement capitalized; highly prejudicial cross-examination as to draft evasion and anarchistic opinions and associations; patriotic speeches and charge by Judge to jury; interference by Department of Justice agents who believed defendants innocent; suppression of testimony favorable to defence; intentionally misleading testimony of expert¹ on vital points." [4793]

¹ Proctor.

² Wadsworth.

³ Boda.

The Supreme Judicial Court, in affirming the denial of the motion, said:

"The judge who presided at the trial and who heard the motion has decided that no reliance can be placed upon the alleged confession; that its truth is not substantiated by other affidavits; that the allegations of conspiracy to convict, of improper suppression of evidence and of improper use of unreliable witnesses, are not made out. These decisions are of matters of fact. Upon them the judge's findings are final. *Commonwealth v. Sacco*, 255 Mass. 369. *Commonwealth v. Dascalakis*, 246 Mass. 12, 32.

"The granting or the denial of a motion for a new trial rests in the judicial discretion of the trial judge. *Commonwealth v. Devereaux*, 257 Mass. 391, and cases cited; and his decision will not be disturbed unless it is vitiated by errors of law, or abuse of discretion. *Berggren v. Mutual Life Ins. Co.* 231 Mass. 173, 176." [4888]

The Court decided also that there had been no abuse of discretion by Judge Thayer because the confession itself could not have been used on a new trial of the defendants and because

"An impartial, intelligent and honest judge would be justified in finding that the confession gains no persuasive force from the credibility of Medeiros; that the facts relied upon by the defendants in confirmation, if true, go no further than to furnish basis for a contention that he and some members of the Morelli gang of criminals took part in the murder at South Braintree, but fall far short of furnishing adequate proofs of their guilt or of establishing reasonable doubt of the guilt of the defendants." [4893]

Governor Fuller in his report said that he gave no weight to the Medeiros confession and was not impressed by Medeiros' knowledge of the crime:

"I give no weight to the Madeiros confession. It is popularly supposed he confessed to committing this crime. In his testimony to me he could not recall the details or describe the neighborhood. He furthermore stated that the Government had doublecrossed him and he proposes to doublecross the Government. He feels that the District Attorney's office has treated him unfairly because his two confederates who were associated with him in the commission of the murder for which he was convicted were given life sentences, whereas he was sentenced to death. He confessed the crime for which he was convicted. I am not impressed with his knowledge of the South Braintree murders." [5378f]

The Lowell Committee said:

"The impression has gone abroad that Madeiros confessed committing the murder at South Braintree. Strangely enough, this is not really the case. He confesses to being present, but not to being guilty of the murder. That is, he says that he as a youth of eighteen, was induced to go with the others without knowing where he was going, or what was to be done, save that there was to be a hold-up which would not involve killing; and that he took no part in what was done. In short, if he were tried, his own confession, if wholly believed, would not be sufficient for a verdict of murder in the first degree. His ignorance of what happened is extraordinary, and much of it

cannot be attributed to a desire to shield his associates, for it had no connection therewith. This is true of his inability to recollect the position of the buildings, and whether one or more men were killed. In his deposition he says that he was so scared that he could remember nothing immediately after the shooting. To the Committee he said that the shooting brought on an epileptic fit which showed itself by a failure of memory; but that hardly explains the fact that he could not tell the Committee whether before the shooting the car reached its position in front of the Slater & Morrill factory by going down Pearl Street or by a circuit through a roundabout road. Indeed, in his whole testimony there is only one fact that can be checked up as showing a personal knowledge of what really happened, and that was his statement that after the murder the car stopped to ask the way at the house of Mrs. Hewins at the corner of Oak and Orchard Streets in Randolph. As this house was not far from the place on a nearby road where Medeiros subsequently lived, he might very well have heard the fact mentioned. In short, [5378s] if the Government were to try to convict him of this offense, and he were to say that the whole thing was a fabrication to help Sacco and Vanzetti, he certainly could not be convicted on his own confession, and probably not even indicted.

"How far do the other affidavits corroborate his statement? They state that Madeiros—who seems to have been rather prone to boast of his feats—had previously told Weeks that he had taken part with the Morelli gang in the South Braintree crime, and had talked with the Monterios also about it. The affidavits further state that he was acquainted with this gang, which consisted of a hardened set of criminals who had stolen shoes shipped from the Slater & Morrill and Rice & Hutchins factories, and were accustomed to spot the shipments when made at such factories; that on April 15th, 1920, a number of that gang were out on bail for a different offense for which they were afterwards sentenced, and consequently could physically have been at South Braintree; that the photographs of Joe Morelli showed a distinct resemblance to Sacco and to whoever shot Berardelli, and that of Benkoski to the driver of the car—but identification by photograph is very uncertain; that Joe Morelli possessed a Colt automatic 32-caliber pistol. They state that one of the gang was seen in Providence late on the afternoon of April 15th in a Buick car which, by the officer who so reported, was seen no more. In regard to the last item, the great improbability may be noted that bandits who intended to hide the car in which they made their escape should have first shown it in the streets of Providence after all but one of the members of the gang had already returned in another car. Even without considering the contradictory evidence it does not seem to the Committee that these affidavits to corroborate a worthless confession are of such weight as to deserve serious attention." [5378t]

The contention of the Committee that Medeiros could not be found guilty of murder because he had not known there was to be any killing has been criticized both as an unwarranted attempt on the part of the Committee to decide a question of law and on the ground that it was not a correct statement of the law. Surely in the case against Vanzetti there was nothing to show connection with the actual shooting, nor even anything to show he had knowledge that shooting might take place. Vanzetti

was found guilty because he was participating in a conspiracy to rob under circumstances which would be likely to result in murder. This was the basis of the prosecution's claim and of Judge Thayer's charge [78, 2245-2249]. A man has been held guilty of murder in the first degree who was merely acting as sentinel. (See *People v. Michalow*, [1920] 229 N. Y. 325, at page 330.) It cannot be supposed that any court would make an exception on the ground suggested by the Lowell Committee, namely, that the felon had been told by the others in the party that they were going to rob but not to kill, if in fact the bandits went armed and death resulted. (See also 29 Corpus Juris 1073, 1074, notes 59-62.)

The car said to be the murder car was not seen late on the day of the crime in Providence as stated in the Committee's report, but in New Bedford [4420]. This town is more in direct line than Providence with Matfield where the murder car had last been noticed, and also was not the home town of the Morelli gang, as was Providence. It is, therefore, not so remarkable for the bandits to have let this car be seen in New Bedford.

The Committee took into consideration arguments which had been presented before it by Mr. James E. King, an editorial writer of the *Boston Transcript*, who, as the result of an analysis of the case in connection with his editorial duties, had become convinced of the innocence of the defendants and the guilt of the Morelli gang [5327]. Mr. King made a careful study of the movements of the escaping car or cars, the details of which are not a part of the record.

Mr. Ehrmann had argued before the Committee that King had in part confirmed the story told by Medeiros because he had shown that the murder car must have stopped for some time and that this was accounted for by Medeiros' description of the change from one car to another in the Randolph woods [5327]. The report stated Mr. King had suggested that his conclusions corroborated Medeiros:

"Mr. James E. King brought to the attention of the Committee some calculations he has been making about the position at various times of the escaping bandit car, to the effect that if it traveled at the rate of speed the witnesses testified it would have taken much more (*sic*) time than elapsed between the moment of the murder and the arrival at the Matfield crossing. He suggested that the delay could be accounted for on the theory that the Morelli gang had committed the murder and spent some time in the Randolph woods three and a half miles from South Braintree while changing from a Buick to a Hudson, as described by Madeiros." [5378v]

(Obviously the word "more" used in the report is an error since the car was described as going very fast, and the correct word should be "less.")

The Lowell Committee concluded that Mr. King's observations rested on data too uncertain to be worth very much and that it was incredible the bandits should have spent about twenty minutes so near the road and so short a distance from the scene of the crime. It suggested th the

extra time might be accounted for by the error of turning into Orchard Street plus the delay resulting from the inquiry at the Hewins' house. [5378v]

This explanation does not account for the lapse of time. There is no evidence as to how far along Orchard Street the bandit car had traveled before it turned round. The total length of Orchard Street, however, is about half a mile, so that the time consumed in this operation must necessarily have been very short. (The writer in going over the course of the escape traversed the entire length of Orchard Street and turned back to Oak Street in less than four minutes.) It is true that the testimony of the eyewitnesses as to the time when they noticed the car is unreliable. Nevertheless there can be no serious dispute that about twenty minutes must have been used up in some way. The total distance traveled by the car was about twenty-two miles. The time when it was seen at Matfield was fixed in relation to a train and was probably correctly noted. About an hour and ten minutes elapsed between the time of the shooting and the arrival at Matfield. It could not have taken more than forty or forty-five minutes to travel the distance unless there was some stop.

In connection with what the Lowell Committee termed the improbability of the bandits having risked changing cars so near the scene of the crime it may be interesting to note that a local paper at the time showed no surprise in reporting that they had done just this. The *Brockton Enterprise* on April 16th, 1920 said that the police were working on the theory that two cars had been used in the affair and that the gang had separated in woods between South Braintree and Holbrook. Now the Holbrook woods are about three miles from the scene of the crime and the Randolph woods three and a half.

As observed by various witnesses, the escaping criminals traveled through country largely deserted; they traversed almost no villages, and after the first few miles, followed no main highways. Their course showed great familiarity with the countryside. A more detailed description of it accompanies the map facing page 534.

The attorneys for the defendants argued that Medeiros' story of a Buick escaping to the Oak Street woods and a Hudson getting away afterwards was confirmed by the various eyewitnesses and that this account explained discrepancies in the descriptions of the cars [4839, 5328]. Such discrepancies do exist in the testimony, but they may, of course, be due to imperfect observation by the witnesses. Counsel before the Lowell Committee called attention to the fact that at the inquest, but not at the trial, Neal had testified to having seen on the morning of the shooting two cars in some kind of cooperation [5328, 5329]. This testimony was cited as further corroboration of Medeiros.

Both the Governor and the Lowell Committee justly describe Medeiros as showing very little familiarity with the scene of the crime. It must be remembered, however, that according to his story he was being driven under some excitement into places he did not know and that he sat in

the back of a car whose side curtains were partly down. Under circumstances such as these he would hardly have noticed many particulars about the way to the place of the shootings. The report of the Committee fails to observe that he answered correctly a pertinent question regarding the grade of the street from the scene of the crime to the crossing, a detail which, in view of the need for speed in getting away, would be more likely than others to impress itself on an occupant of a fleeing car. The Committee accuses Medeiros, however, on the other hand, of having actually learned only later the one fact he claimed to have remarked on that day, namely, that the car stopped to ask directions at a house on Orchard Street. It seems hardly logical or fair to discredit the man on account of his ignorance and at the same time attribute to duplicity whatever knowledge he shows. It is difficult under these conditions to see what facts he might have stated correctly without becoming by such statement subject to a charge like this one of having really acquired his information after the fact.

However unreliable Medeiros may seem to have been, it can hardly be gainsaid that the hypothesis that the crimes were actually committed by the Morelli gang explains much otherwise inexplicable. It ties up the bandits with the factory robbed, a point important especially in view of the fact that only a short time before the crime the day for carrying the payroll had been changed, a point from which the local press deduced that the bandits had perhaps had some inside source of information. This kind of information the Morellis apparently possessed, for their crimes in the Providence railroad yards were partly thefts of shipments from the two shoe factories in South Braintree. The hypothesis accounts also for the number of bandits observed by the witnesses; it accounts for the two cars seen by Neal; it identifies as Steve Benkosky the pale, sickly man who was noticed by so many different witnesses; it explains the confusion in the description of the fleeing automobile observed by different people at widely separate points, and particularly does it reconcile the varying descriptions of the clothing said to have been worn by the man identified as Sacco.

As was pointed out in the argument before the Lowell Committee [5326], if there were present at or near the scene of the crime a number of brothers, then the descriptions given by the various witnesses can be reconciled. It may well be that instead of these descriptions fitting one man, the witnesses saw in fact different men who resembled each other. It has never been explained how Sacco could for fifteen or twenty minutes have been observed by Mrs. Andrews on Pearl Street and could during the same time have been watched by Tracy at the store in the square. In the brief submitted to the Lowell Committee this discrepancy was to some extent dwelt upon [5371]. The expression of it could have been made much stronger than it was, in view of the fact that Lola Andrews fixed the time of her talk with Sacco as 11:45 [340] and Tracy said that when he made his first trip to the square, between 11:35 and 11:40,

he had seen Sacco there [500, 501]. Mrs. Andrews testified that the man she spoke to had been under the car for fifteen minutes before her conversation with him and Tracy said that the man he noticed had remained in front of the drug store about fifteen minutes after he had first seen him.¹ Neither Tracy nor Mrs. Andrews were ever shown pictures of Joe Morelli. No pictures of the other Morelli brothers were obtained by the defense. [5326]

It should be remarked that the element consciousness of guilt is not lacking from the case against the Morellis. An affidavit was submitted by a police officer, Ellsworth Jacobs of New Bedford, which stated that he noted suspicious actions of Frank Morelli a few days after the South Braintree crime, that Morelli had made as though about to draw a gun and that he had also told certain falsehoods to explain his possession of an automobile [4420]. Joe Morelli's apparently assumed ignorance about Sacco and Vanzetti in his interview with Ehrmann should also be considered in this connection.

Mancini, whose photograph was characterized by one of the witnesses as resembling the man next the driver in the murder car, had a gun of foreign manufacture, which might have fired five of the bullets taken from the bodies of the murdered men. Joe Morelli had owned a 32 Colt. And this, had the Morellis committed the crime, would have accounted for the mortal bullet.

It is remarkable that so much circumstantial corroboration of the Morelli hypothesis should have come to light. The Medeiros confession may be as worthless as the Lowell Committee maintained, yet the probability that the Morelli gang committed the South Braintree murders was at least great enough to have justified an investigation by government authority free from any connection with the prosecution of Sacco and Vanzetti.

¹ See pages 219, 241, 242.

between the duty of the jurors with that of the soldiers who had fought overseas.¹

Annexed to the petition for clemency was the report made to the Greater Boston Federation of Churches by MRS. LOIS RANTOUL, who had been sent to the trial by this Federation for the purpose of passing on the fairness of the proceedings. She said, on the subject of the Judge's attitude:

"It was in my opinion a grave mistake and an injustice to the defendants for Judge Thayer to act as Judge in this case. Judge Thayer had been the Judge in a case just prior to this in which Vanzetti had been found guilty and he had sentenced Vanzetti to fifteen years in States Prison. Under those circumstances it would be impossible for Judge Thayer to preside at this trial with an unprejudiced mind. It was impossible to sit there day after day and not feel that he was convinced the defendants were guilty. I went twice to the Judge's room at the request of Judge Thayer to talk to him. At my first interview which was at the end of the case for the prosecution, and before the defense had presented their case, I told him that I had not yet heard sufficient evidence to convince me that the defendants were guilty. He was much disturbed at this, showing it in both voice and gesture, and said that after hearing both arguments and his charge, I would come to him feeling differently. I assured him my mind would remain open until the end of the trial. At the second inter- [4943] view, I spoke to him in regard to testimony given by George Kelly the employer of Sacco in which Kelly praised Sacco's character while in his employ. The Judge was most scornful, telling me in substance that Kelly didn't mean what he said, because he had heard that on the outside Kelly had said that Sacco was an anarchist and he couldn't do anything with him. It was most shocking to my sense of justice to have the presiding Judge attempt to make me believe hearsay, in place of testimony given under oath on the witness stand. Through the district attorney to whom I spoke I found the hearsay statement of Judge Thayer to be untrue. It gave me the feeling that if such a hearsay atmosphere was surrounding the Judge it was being felt by the jury also. Judge Thayer in his charge hardly referred, either to witnesses or evidence in any detail. His particular emphasis on the testimony of Officers Connolly and Speare relative to conscious guilt, lead him to overstate facts. He says, 'Is the testimony of Officer Connolly true, in that Vanzetti put his hand into his hip pocket?' and further, 'The Commonwealth claims that Vanzetti put his hand into his hip pocket.' The record of evidence shows that Officer Connolly testified that Vanzetti made a motion with his hand towards his hip pocket. Quite different from being in his hip pocket. In my opinion a statement of this kind made in the charge of the Judge is not just, in that it refreshes the mind of the jury with facts that are not on record as evidence. Without knowledge of the law it would be impossible for me to form any opinion on the rulings of Judge Thayer on the matters of evidence." [4944]

An affidavit was filed by JOHN NICHOLAS BEFFEL who had attended the trial as correspondent for the Federated Press. He stated that the Judge had evinced anger early in the trial when shown a statement by the Italian consul to the effect that the Italian government expected the case to be

¹ See Part I, pp. 27, 89.

conducted without reference to the social or political views of the defendants; also that the Judge had shown hostility to Moore and had told the newspapermen: "You wait till I give my charge to the jury. I'll show 'em!" [4930]

All the other persons whose statements were annexed to the petition for clemency appeared in person before the Lowell Committee. They were: Frank E. Sibley, Elizabeth R. Bernkopf, George U. Crocker, Robert Benchley, Lois Rantoul and Prof. James P. Richardson.

FRANK E. SIBLEY had reported the case for the Boston *Globe*. He said:

"—My first impression of Judge Thayer was that he was conducting himself in an undignified way, in a way I had never seen in thirty-six years.

(By President Lowell.) In the court?—I also think the armed guards in the corridors, the means of protection, were such as I had never seen in thirty-six years of reporting. I was very much afraid that some of the reporters might use it, thinking it was valid. His conduct was certainly improper, in fact, I had never seen the like of it before. One day there was a demurrer introduced by counsel, Mr. Moore. He very frequently invited me, and sometimes invited others, to lunch at the table with him. I declined as often as I could gracefully. In fact, I had lunch with him once or twice, but I declined, knowing he would talk uninterestedly, or say something improper about the case. He would come to the reporters' table, most of us eat at one table, six or eight of us, after eating his own lunch and spend a few minutes talking about the case. On one particular occasion Judge Thayer approached the table and said 'I think I am entitled to have printed in the newspapers a statement that this trial is being fairly and impartially conducted.' None of us knew what to say. Judge Thayer has been a newspaper man and he knew what he was doing. I kept my eyes down because I felt in a moment he would turn to me and I was trying to find something I could answer, and he said [4954] 'Sibley, you are the oldest. don't you think this trial is being fairly and impartially conducted?' I said, 'Well, I don't know whether to express their opinion, but of course, we have talked it over, and I think I can say we have never seen anything like it,' and he didn't say anything.

(By Judge Grant.) Any comments to the contrary?—No, sir. Not a word of any kind. It wasn't what he actually said on the bench, it was more his manner than anything that got into the record. One day he accused me of misquoting him in the newspaper. It happened that Sacco was on the stand, being cross-examined by Mr. Katzmman, and Mr. McAnarney objected to the cross-examination. Jerry McAnarney rose and objected to the testimony. Sacco's story of being informed by a New York lawyer during all this excitement to get the literature out of the way, and Judge Thayer said to Mr. McAnarney 'Are you going to claim that your client was acting in the interest of the United States?' The other lawyers began to pass notes up to Mr. McAnarney at once, and Mr. McAnarney seemed confused and apparently didn't understand what had

been said to him. When the Judge repeated the question it was in a different form. It happened at ten minutes of three, that at that minute I was writing the last of my story, and the telegraph operator was taking it away sheet by sheet. You have to work quick in that sort of work and instead of writing the first question and the first answer, it was the last question and the last answer, and the last question had been different in form. It did not state in the 'interest of the United States.' When I got back to Boston I remember—

(By President Lowell.) I don't quite understand. You said 'the last of this question'?—The last of this question repeated—when he repeated this question he took out that phrase.

(By Judge Grant.) The judge took it out?—(President Lowell) He asked the question in a different form.—(By Mr. Sibley) Yes.

(By Judge Grant.) Oh, I see.

(By Mr. Sibley.) When I got back to Boston I remembered the phrase as I had it first, as it had first been spoken, but I had no notes. I didn't know what to do, if I ran it in the paper with a headline, and was questioned about it I had no notes to prove it. I was in doubt as to what to do, then I remembered Shea of the Post who had taken notes, so I called him and asked if he heard it as I did, and I thought if I published it and was put on the stand and asked if I had notes I should say no, I had taken no notes, but depended on my recollection. Then I remembered Mr. Shea. So I consulted with Mr. Shea regarding this statement of what the Judge had said. In the end I used it. I used it in my story.

(By Judge Grant.) Then what happened?—What happened next is the point of all this. During the morning recess I was called to the Judge's Chamber and the Judge had a typewritten sheet in his hand. He [4955] said 'You quote me as asking whether Mr. McAnarney was going to claim that his client was acting in the interest of the United States and I didn't say that. I couldn't believe it was so what you said, in order to settle it I had the stenographer transcribe what I said and here it is.' And the phrase did not appear on the sheet. At that time the bailiff came in and said the jury was ready and that was the end of the colloquy.

(By Judge Grant.) He had a sheet from the official stenographer?—He had.

What did he charge you with?—I was charged with printing an article pertaining to contain what was said in the courtroom which was false, and which did not contain what he said, and Mr. Shea without consultation with me used the same thing, and I don't know whether the Herald did or not. I was going through a very great trouble at that time and the details are very foggy in my mind.

(By Judge Grant.) I see, it was simply the typewritten sheet which the official stenographer had given him.

(By Mr. Sibley.) I have seen the judge sit in his gown and spit on the floor. I don't know whether there was a spittoon there or not. I have heard him swear. His conduct was very improper. What affected me more than

anything else was his manner. It is nothing that you can read in the record. In my thirty-five years I never saw anything like it. When I went there, officers who knew me felt me over to see if I had a gun. His whole manner, attitude seemed to be that the jurors were there to convict these men.

(By Mr. Thompson.) I want to bring out this point—what did you observe as to the conferences at the judge's bench, certain happenings that were not taken by the official stenographer.—In reference to that, I went to the toilet one day and passed close to the bench. The jury was on the right hand side of the room, and the witness stand between the jurybox and the bench. On the left hand side there was a door leading to a corridor, running to the toilet at the end of the hall, and I had to pass close to the bench. When there was a halt in the proceedings I took advantage and I had to go by the end of the bench and the lawyers had stepped up to have a little conference, and the stenographer stepped forward—

(By Judge Grant.) The judge sat at the end?—At that time.

(By Mr. Thompson.) Yes, this was a short recess. (By Judge Grant.) Oh, yes, I see.

(By Sibley.) The lawyers were going to confer with the judge at the bench and I passed close to them on my way out, and I got there about the time the stenographer came up with his notebook to take down what is said as is customary, and the Judge said 'Get the hell out of here, who called you up here?' And I paid no attention and he was whispering so I wouldn't hear." [4956]

Sibley also said he had called defendants' counsel "those damn fools" and had ruled against them "with the air of prejudice and scorn." [4957]

MRS. ELIZABETH R. BERNKOPF had not attended the trial but had reported the arguments of the motions for a new trial. On these occasions she had often ridden to the Courthouse on the same train with the Judge who conversed with her. She said of his attitude:

"I know he conducted himself as no judge should; that he talked continually about the case and the impression he gave was that he was decidedly antagonistic towards the defense. He referred to Moore as 'that long-haired anarchist from the West,' and that he couldn't come into his court and run things as he pleased, and that he might be able to get away with that sort of thing in the courts of California, but he was going to find out that he couldn't be intimidated by Moore, or anybody. The conversation was along that tenor entirely." [4965]

GEORGE U. CROCKER, a well known lawyer of Boston, at one time City Treasurer, testified that during the course of the trial he had been approached by Judge Thayer in a club. The Judge, he said, had told him: "we must protect ourselves against them, there were so many reds in the country," and he had a couple of them up in the trial at which he was presiding. On another occasion, Crocker said, Judge Thayer had taken a paper out of his pocket saying it was part of his charge, and, referring to

an argument Moore had made, had said: "That will hold him" [4969]. The witness told the Committee he thought Thayer "was bound to convict these men because they were reds." [4970]

ROBERT BENCHLEY, then dramatic editor of *Life*, told of a conversation he had had with his friend Loring Coes of Worcester in the early summer of 1921:

"When he came, what did he say?—He was very enthusiastic. He was talking with Web Thayer. He said, 'Web has been telling me about these people down in Boston, the Reds.'

By the way, you know Judge Thayer all your life?—Yes.

Commonly called Web Thayer?—Yes. He knew my parents very well. And Loring Coes said that Web had been saying that these bastards down in Boston were trying to intimidate him. He would show them that they could not and that he would like to get a few of those Reds and hang them too. Mr. Coes was very enthusiastic about this point of view and I did not show him I was not, so he continued along that line. He said Web Thayer was quite proud of his stand in this matter and the stand he was going to take in upholding the best traditions of the bar and that he would get these guys sooner or later and show them they couldn't put anything over on him. That was the substance of what Mr. Coes said.

Did Mr. Coes not long ago have an accident?—Yes, he was thrown from a horse.

What was the effect?—I really don't think that it had any bad effect on his memory.

I noticed in the newspapers Mr. Coes denied ever having told you anything of this kind.—I don't know because I haven't seen him since. I have seen Mrs. Coes. I think probably he was pretty cross at me because we had no communication about it and I think he thought I violated the country club code of etiquette in reporting a conversation of that nature and in dragging him into it." [5019]

Coes never testified or gave any affidavit on the subject. A reporter, JOSEPH J. GLANCY, testified to having spoken with Coes on the telephone after the Benchley statement first became public in April. According to this witness Coes stated he did not remember what had been said on the occasion referred to. [5023]

MRS. RANTOUL before the Committee repeated substantially what she had written in her report; asked about Judge Thayer's conversations with her, she said:

"—I don't remember the sequence of the conversations. He always asked me how I thought the trial was going and my answer was, of course, I was neutral. This was before the defense had been put in at all. I tried to maintain my neutrality as I did right through the trial. He said he thought I would change my opinion when it was over and the suggestion was I was foolish to remain neutral in other words.

Is that all you remember of the first conversation? Was there anything about his talk and gestures?—His talk and gestures were extremely vehement. He was always more or less assured of what he wanted to impress you with. I was a little startled and I wrote it down thinking it was curious.

Coming to the second conversation, did he send for you again?—Yes.

What stage had the trial reached at that time?—The trial reached the stage of the defense going in then. The day I went to him there happened to be put on Sacco's employer. He was put on by both sides. This was the time he was put on by the defense. The defense was going in I know and he asked me how I thought the trial was going and I said one interesting thing stood out and that was Mr. Kelley's characterizing of Sacco as being a fine worker. I said I thought that was very interesting because a man's background was what a man's employer thought of him. He said, 'You should not believe anything that man says on the stand. Off the stand he calls him everything under the sun' [5024]. What he wanted to impress me with was that off the stand Kelley was not as pleased with Sacco as he was giving the people to understand.

What reply did you make to that statement?—I made the reply, 'I didn't know I was here to judge people by what was said off the stand; I was here to judge them by what was said on the stand.'

Did he make any reply to that?—I think he just shrugged his shoulders. I was pretty het up over all he had said and I don't think I waited long after that. [5025] . . .

(By Pres. Lowell.) What was in the charge that struck you unfair?—The thing that struck me in the charge as being unfair was, one of the things was his extreme desire for those men to be loyal and to do their duty and stand up and all this talk. It would have an immediate effect on the type of intelligence of that jury. You were dealing with the type of intelligence that would eat that stuff up. [5026] . . .

(By Judge Grant.) I don't think you say anything about his charge?—I dare say I didn't. It would not be a thing that I would naturally or normally put in. I was there to give an account of the testimony given.

And express your opinion as to the guilt?—Yes.

And you expressed your opinion as to the evidence?—I gave the attitude of the judge. That is the only thing I think I did.

(By Mr. Thompson.) If the point is to be made, I ask you to take all the time you need and read it yourself as to what is in there and what is not in there in regard to this matter.—I do say it was impossible to sit there day after day and not feel that he was convinced the defendants were guilty. There was something in his manner.

(By Mr. Ranney.) What was in his manner? That was a pretty serious accusation.—What there was in his manner, there was a feeling of intolerance for the attorney for the defense which was very strong.

(By Pres. Lowell.) Was that true of anybody except Moore?—Yes it was, at least it struck me that he had a complete intolerance with any-

thing in the presentation of the defendants' case. I think he tried to be fair in his decisions as to the admission of evidence. That was a purely legal point. I am not a lawyer and I could judge those things just as a lay man but it seems that he tried to be fair in that but his whole attitude surrounding the judge's bench at that time was one of hostility towards those men. I was convinced of it. I should never have mentioned it, unless I was. I leaned over backward in this report to make it fair. There was many things I could have put in that was true but not in my opinion fair." [5027]

PROFESSOR JAMES P. RICHARDSON, of Dartmouth College, a conservative lawyer, who had known Judge Thayer for a long time, testified concerning a conversation with him in November, 1925:

"—Judge Thayer met on the field with a group about. He spoke to me by name. He had known me for a long time. He immediately went into the subject of the Sacco-Vanzetti case; he referred at once to the motions which had been pending before him, and which he within a short time disposed of. My recollection is, I don't know, but Mr. Ranney is probably correct, would have been that some of these motions had been decided on shortly before this conversation.

(By Mr. Ranney.) That is right, all decided.

(By Prof. Richardson.) All had been decided, probably a short time before. Judge Thayer said as near as I can remember 'Did you see what I did with those anarchistic bastards the other day. I guess that will hold them for a while.'

(By Mr. Thompson.) Yes?—'Let them go to the Supreme Court now and see what they can get out of them.'

Yes?—There was more of the same sort.

Yes?—Well, there was more of the same sort. My recollection is fairly accurate. [5065] . . .

(By Mr. Ranney.) And he had known you before?—Yes.

For how many years?—All of ten or fifteen.

And did you form a like or dislike of him before this time? Prior to November 1, 1924, I mean?—I can't say that I did. No.

(By Judge Grant.) How old a man is he?—Judge is a man I would say of 78. He is a man much older than I am. His class is '79, my class is '99. I had some previous connection in college affairs with him, and he had also been a member of various alumni societies, and I had come in contact with him more-or-less. He was one of the members of the Alumni counsel and I met him more-or-less.

During your knowledge of him in connection with the College, you came in contact with him?—He had been a member of the Alumni Counsel.

I think that is all.

(By Mr. Thompson.) His attitude on the occasion you refer to, did he discuss it calmly, or was he excited over Sacco and Vanzetti?—At both times, Mr. Thompson, he was violent.

(By Judge Grant.) He was what?—Violent in his methods of expression."]5069[

Professor Richardson had, on April 17th, 1927, sent the following unsolicited letter to Governor Fuller:

"As a member of the Massachusetts Bar with an actual practice [5067] in Boston for a period of fifteen years, from 1902 to 1917; as a member of the Massachusetts Constitutional Convention of 1917; as one whose uncle, James B. Richardson, was a judge of the Superior Court of Massachusetts for almost twenty years; and as the present holder of the Chair of Law at Dartmouth College, the college of Judge Webster Thayer, I hope that I may be pardoned for adding this letter to the many written to you regarding the Sacco-Vanzetti case. I cannot pretend to have followed this case in all of its details, yet I have kept track of it with some care, as is natural for a lawyer and a teacher of law and government. I have come to the very definite conclusion that it would be a most unfortunate thing if these men were allowed to go to the electric chair without further careful examination of the case.

"The suggestion that Your Excellency should appoint an impartial commission to aid you in such a review of the case seems to me an excellent one, and I sincerely hope that something of the sort will commend itself to you. I know of my own personal knowledge that Judge Thayer's mental attitude during the progress of this case was such as to make him liable to pre-judge it in many of its later stages. I had a personal conversation with him in Hanover at a date which was either in the fall of 1924 or in the fall of 1925, (I regret that I cannot place it more accurately) in which it was very evident that Judge Thayer regarded these men with a feeling which can only fairly be described as abhorrence." [5068]

Two other witnesses testified before the Committee in relation to the Judge's attitude. ARTHUR D. HILL, who had acted as counsel for the defendants on one of the motions after the trial, told of the impression made upon him by Judge Thayer:

"—The thing which struck me first about the case was the attitude and condition of mind of Judge Thayer. I came to the case perfectly without any feeling based upon the character or opinions of the defendants, other than a general prejudice which I confess to against people who dodged the draft; apart from that I cared nothing for their opinions so far as the case was concerned. I had no feeling one way or the other about Judge Thayer. I was shocked at the condition of nervous tension in which I found him to be. I can only describe it by saying that he seemed to me absolutely obsessed with the case; he could talk of nothing else, and he could not refrain from talking of that.

(By Judge Grant.) This was a little over two years after the actual trial, the first trial?—I don't even know, Judge Grant, when the first trial was; it was between March 15, 1924 and October 3, 1924, at various days. The moment I found myself with him he would invariably take up the subject of the trial and talk about it, and a number of times he called me

into the lobby, either alone or with Mr. Thompson, and talked to me about the case. I not only noticed that he talked to me about it and to Mr. Thompson about it but that he talked to every one about it, and while I cannot now recall any one thing he said that I would be willing to swear to it, I do recall that he talked in a manner indicating certainly very strong excitement, and showed that he was very far from being in a normal state of mind about the case.

Do you mind giving some specific instance so as to show the kind of things he said or did?—I am sorry, Judge Grant, I cannot, and I am ashamed to say that although I have racked my memory I cannot recollect any definite instance; I should be drawing on my imagination if I attempted it. [5206] . . .

—The impression on my mind of the Judge's state of mind is perfectly definite and very clear, and I can visualize the way he looked, I can visualize my impression of his manner and his feeling as revealed by his manner; the exact words I cannot remember, nor the subject-matter of the conversation, further than there were a good many generalities in it, about the danger to our institutions from foreigners and radicals, and the importance of respect for the law and of a firm hand in the administration of justice. His manner indicated to me a strong feeling of prejudice, both against the men themselves, their opinions and their counsel Mr. Moore.

During the arguments of the case, both on the questions arising out of the insanity matter and on the arguments of the motions when they were heard—

(By Judge Grant.) Did you argue the Ripley motion or the bullet motion?—Yes, I argued the bullet motion myself.

What was that?—I only argued one motion; I argued the presence of the bullets in the jury room.

(By President Lowell.) The cartridges?—Yes, sir, the cartridges. I argued that and that was the only motion I did argue. I heard Mr. Thompson argue one or two other motions. The impression I got at that time was that Judge Thayer was absolutely impervious to any arguments whatever and that it was a waste of time to make them. He made that impression very definitely on my mind, and throughout that whole time my feeling was that he had got into a state of mind when he could not properly try that case, of which he himself was hardly conscious. One thing that shocked me a good deal was his evident pleasure in being photographed by the newspapers in connection with the case. On one, and I think on two occasions, he practically forced me and Mr. Thompson out so as to be photographed with him in Worcester, and he showed, well, a very unfortunate attitude in regard to that; and it showed to me, well, it indicated, I had a feeling—mind you, he was always perfectly kindly and gracious to me out of court, and he did nothing in court except to show as a Judge can show, that he is strongly against you from the beginning in everything that you say. But I felt rather sorry for the man. I felt that he had been subjected to more of a strain by threat of political

excitement, of emotion, and of consciousness of his own position and importance that he had been able to bear . . . [5207]

—The impression I had was that the excitement in regard to the case in foreign countries, the threats which had been made there of violence, coupled with an atmosphere of fear of Red outbreaks which existed in the country at that period, had been greatly wrought upon the Judge's mind." [5208]

MARQUIS AGOSTINO FERRANTE, Italian consul in Boston, had attended the trial at Dedham almost every day. He testified about his impression of the Judge:

"—But he was sure that those two men were guilty, he was absolutely confirmed in his soul that those two men are guilty, and this feeling of his was evident all through the trial. You can read the trial, you can read the record that you have, and you will find sometimes an answer, sometimes a question that is all right, but you can see sometimes that you have the general impression, and the jury had it. Suppose I ask you, 'This is a pencil?' and you say, 'No.' I ask you, 'This is a pencil?' and you say 'No.' That would be very different to me. I remember one day a question asked by Moore to the witness, I don't remember which one, or maybe of the two, or Sacco, or Vanzetti, and Judge Thayer turned to the side, look at the jury, 'Question——' how you say it, oh, yes, 'excluded.'

(By President Lowell.) Excluded?—"Question excluded." That gave me the feeling that Judge Thayer don't like Mr. Moore. That was my feeling, but because I never like this man——

We haven't met anybody who did as yet.—But I think, Judge Thayer, I did not think it was the right time to show his feelings. That is one thing that shocked me very much. It was the little things. I told Judge Thayer and he laugh about it." [5245]

JUDGE THAYER himself testified before the Lowell Committee, as did ten of the trial jurors, but counsel for the defendants were not permitted to be present, nor has the testimony of the judge or of the jurors been since made public.

MR. THOMPSON in his argument before the Committee pointed out the difficulties he was laboring under through being in ignorance of this testimony. He contended that the judge's state of mind was as important in the decision of the motions for a new trial as it was at the trial itself and that a judge who expressed himself with the violence and bias of Thayer could not be considered capable of giving the defendants a fair hearing. Thompson pointed to the use of guards at the trial as the first instance of prejudice since it intimated to the jurors that the defendants were men against whom it was necessary to be protected.

Parts of his argument follow:

"I am here for two men who are going to die on August 10 unless some-

body does something to relieve them, and no respect for the courts of this State in the abstract can prevent my telling what I think about this particular Judge in this particular instance.

"I think I know how at least two members of this Committee, who are lawyers, feel about the courts of Massachusetts. I know the shock that must come to you and to each of you when you hear a man like Professor Richardson repeat the language of this judge about two men on trial for their lives. I know the feeling that we must protect our courts from the disgrace that will fall on them if this thing comes out. It has come out, gentlemen. It cannot be concealed. Isn't there a limit? Do you think the courts of this State are going to be really protected, really to hold the popular esteem by subterfuge, by secrecy, by concealing the facts, the truth? Is it not more likely to bring about a maintenance of the high standards that we hitherto have had—I say hitherto; I mean up to the last 25 years—to face disagreeable facts as they really are and try to cure them rather than to hide them and talk in loose and general terms about the respect owed to the courts of Massachusetts?

"I do not yield to anybody in respect for the courts, but I want to have the courts respectable, and I will not give my personal respect to any judge, however eminent, merely because he holds his official position, who is capable of saying the things that were said by this judge during this trial and after this trial while motions were pending before him. If that is going to be the test here, if the alternative is going to be respect for [5267] Judge Thayer, or justice to these men, my choice is made, because I cannot have any respect for a man who will talk as he did about these men and about his attitude toward them. [5268] . . .

"I have known Judge Thayer all my life. . . . I could not honestly say that I think Judge Thayer is all the time a bad man or that he is a confirmed wicked man. Not at all. That isn't so. But I say he is a narrow minded man, he is a half educated man, he is an unintelligent man, he is full of prejudice, he is carried away with his fear of reds, which captured about 90 per cent of the American people. Unfortunately all the half educated, uncultivated class joined in that propaganda. His categories of thought are few and simple—reds and conservatives, and 'soldier boys.' No margin between them. No intermediate ground where people cannot be placed in the one class or the other. He knows only a few simple things; the country, the war, the reds. That is the way I size him up. Not that he intended to be wicked, or that he intended to be bad. I think he thought that he was rendering a great public service. As he said to Benchley: 'I will protect the citizens against the reds,' and all that. I won't stop to read his exact words. That is the type of man you are to think about, violent, vain, and egotistical." [5273]

Mr. Thompson argued that the standing of the witnesses who criticized the judge precluded the possibility that they had distorted the character of his attitude. He called attention to Thayer's abuse of Moore at the trial and to such incidents as then occurred as his examination of Kurlansky¹ and of Kelley² and his question to counsel, asked while Sacco was under cross examination, about the collection of the literature as being in the interest

¹ See pp. 232, 233.

² See p. 382.

of the United States; ¹ he cited the misquotation of the record in the judge's last opinion.² Mr. Thompson contended it was impossible to get the judge's antagonism to Moore before the higher court and stated that this court had never found a judge of the lower court guilty of abuse of discretion, the two benches being so closely linked together. [5275-5278]

Concluding on this aspect of the case he said:

"But the courts have failed to do justice. There is something to complain of, and you cannot get around it. That language quoted by Richardson and others has gone around the world, translated into every language of modern Europe.

"Do you think it is wise to try to find some way to belittle the seriousness of that so as to get these men executed? Or is the approach to be like this: we won't advise this Governor to exercise clemency if we think the trial has been fair and if we think there is no reasonable doubt of guilt; but in approaching that question of whether the trial was fair and whether there is a reasonable doubt of guilt we will not be predisposed to find against these men; we will be perfectly open minded and just as willing, in spite of the honor of the Massachusetts courts, in spite of all the considerations that lead a conservative man to hesitate before doing anything for men like this, in spite of that, we see enough in this to know that if we on the extensive evidence now before us could reach an opinion favorable to the contentions of these men nothing would do so much to quiet down the agitation which will never be quieted as long as the world lasts if these men are executed. A new trial is all they ask. You may not believe it, but I am going to state it just the same—I have recently been twice discharged by Sacco in this case, the last time only a few days ago, and twice have I gone back to him. Why? Only because I cared for him? No. He seems to me to be a fanatic of a type that the whole drift of my education, background and training leads me to disapprove. No, I have stayed by him because I believe he has been dealt with unfairly, and because I believe that the danger to our institutions involved in what has occurred in this case is such that any man who has any desire at all to see the maintenance of American institutions in their pure form ought to stand by even if he is discharged every day by Sacco and Vanzetti, and ought to try to prevent what is likely to happen in this case." [5279]

In answer to these contentions MR. RANNEY said that the record failed to show any such prejudice as was claimed:

"So that we say, without further argument, just this: that if Judge Thayer's mind was prejudiced almost to the point of obsession during that trial, that it would be indicated somewhere in that record, and that, search as you will from the first page to the last of that record, you will find no betrayal of that prejudice, except—and I must characterize it is such—in the fanciful argument of my learned brother.

JUDGE GRANT. I understood Mr. Thompson to state, though possibly I may have misunderstood him, that if the judge expressed outside the court

¹ See pp. 71, 434-436.

² See p. 464.

room an attitude of hostility toward the defendants, which was not in any way communicated to the jury, that, as a matter of law, that would be an unfair trial.

MR. RANNEY. I think that was the substance of it.

MR. THOMPSON. I think that deprived us of the right guaranteed us by the Constitution. It indicated prejudice, and we were not obliged to show actual effect of that prejudice upon his conduct.

MR. RANNEY. I will go further, Judge Grant.

JUDGE GRANT. Yes, go ahead.

MR. RANNEY. Evidence has been offered here, and of course there must have been, that Judge Thayer's mind was prejudiced throughout this trial. There is the evidence, for instance, of Sibley and other witnesses. Now, we say that that is evidence only of prejudice, and if Judge Thayer really had a prejudiced mind that that must have been shown and must have gotten into the record of this trial, and we say that it has not, and that again we are content to leave to this Commission for an examination of the record to find out. In other words, if he was prejudiced it could [5335] not have helped showing in the record of this trial, and it does not, and we leave that matter there.

MR. THOMPSON. Would sneers show?" [5336]

Mr. Ranney maintained that the judge had been fully justified in his antagonism to Moore and that neither of the McAnarney brothers who appeared before the Committee had complained of unfairness. He pleaded for the right of a judge to be human and express himself freely to his friends out of court. He argued that the decisions on the various motions showed a mind free from prejudice and asked the Committee if they would not have come to the same conclusions as had Judge Thayer. [5341-5347]

The Committee in its report discussed the charge of prejudice at some length:

"It has been said that while the acts and language of the Judge, as they appear in the stenographic report seem to be correct, yet his attitude and emphasis conveyed a different impression. But the jury do not think so. They state that the Judge tried the case fairly; that they perceived no bias; and indeed some of them went so far as to say that they did not know when they [5378k] entered the jury room to consider their verdict whether he thought the defendants innocent or guilty. . . .

"Affidavits were presented to the Committee and witnesses were heard to the effect that the Judge, during and after the trial, had expressed his opinion of guilt in vigorous term. Prejudice means an opinion or sentiment before the trial. That a judge should form an opinion as the evidence comes in is inevitable, and not prejudicial if not in any way brought to the notice of the jury, as we are convinced was true in this case. Throughout this report the Committee have refrained from reviewing the evidence in detail and stated only their conclusions with comments upon points that seemed of special significance. From all that has come to us we are forced to conclude that the Judge was indiscreet in conversation with outsiders during the

trial. He ought not to have talked about the case off the bench, and doing so was a grave breach of official decorum. But we do not believe that he used some of the expressions attributed to him, and we think that there is exaggeration in what persons to whom he spoke remember. Furthermore, we believe that such indiscretions in conversation did not affect his conduct at the trial or the opinions of the jury, who indeed, so stated to the Committee. [5378l] . . .

"Again it is alleged that the whole atmosphere of the court-room and its surroundings, with the armed police and evident precautions, were such as to prejudice the jury at the outset; while the remark of the Judge to the talesmen that they must do [5378m] their duty as the soldier boys did in the war was of a nature to incline them against the prisoners. The jury do not seem to have been conscious of any such influence, or of the presence of any unusual number of police. Nor do they appear to have entered upon the case with the slightest predisposition in favor of the prosecution, some of them at least very far from it. We do not think these allegations have a serious foundation.

"To summarize, therefore, what has been said: The Committee have seen no evidence sufficient to make them believe that the trial was unfair. On the contrary, they are of opinion that the Judge endeavored, and endeavored successfully, to secure for the defendants a fair trial; that the District Attorney was not in any way guilty of unprofessional behavior, that he conducted the prosecution vigorously but not improperly; and that the jury, a capable, impartial and unprejudiced body, did, as they were instructed, 'well and truly try and true deliverance make.'" [5378n]

The Governor said:

"I have consulted with every member of the jury now alive, eleven in number. They considered the judge fair; that he gave them no indication of his own opinion of the case. Affidavits have been presented claiming that the judge was prejudiced. I see no evidence of prejudice in his conduct of the trial. That he had an opinion as to the guilt or innocence of the accused after hearing the evidence is natural and inevitable." [5378e]

After the decision of the Governor was announced counsel made their first attempt to bring before the Courts the question of Judge Thayer's prejudice. This subject had not been raised on the appeal from the judgment of conviction because the material had not then been available. Some of it was in the possession of counsel at the time the Medeiros motion was made, but the point was not raised, although reserved in the bill of exceptions prepared on the appeal from that decision. Apparently counsel were waiting for additional confirmation.

A motion was made by Mr. Hill for revocation of the sentence and for a new trial. Over the protests of counsel Judge Thayer was assigned to hear the motion. A jurisdictional point was at once raised by the prosecution, namely, that under the existing Massachusetts law no motion for a new trial could be heard after sentence had been imposed and that a motion for revocation of sentence was only another attempt to accomplish the same thing. Judge Thayer passed only on this jurisdictional question. For the

same reason the Supreme Judicial Court held that it was unnecessary to decide whether or not Thayer had been properly assigned to hear the motion charging him with prejudice. The claim of prejudice was not discussed at all.¹

Efforts to secure the intervention of the Federal courts failed because, under the Constitution, those courts have no power to intervene in state criminal cases unless the state court had not proper jurisdiction of the case. The Federal judges before whom the matter was brought all agreed that prejudice on the part of a trial judge would not deprive him of the necessary jurisdiction and therefore the proceedings were not void.² Justice Holmes wrote an opinion (quoted in full in Part I, pages 180, 181) in the course of which he stated that counsel thought the affidavits relied on to show prejudice proved "somewhat more" than he himself drew from them. This is the only judicial comment on the subject of Judge Thayer's prejudice.

But the finding of the Lowell Committee that there had been on the part of Judge Thayer a "grave breach of official decorum" received widespread comment. Many newspapers wondered what the Committee would consider prejudicial conduct on the part of a Judge. The *Springfield Republican*, agreeing with many other opinions, urged the Governor not to permit the execution unless the conduct of Judge Thayer could be deemed above reproach, and, referring to the report of the Committee, it stated in an editorial:

"The malignant mischief that can be done by that phrase in the mouths of promoters of industrial and social strife in the years to come appalls the imagination."

¹ See Part I, pp. 178, 179.

² See pp. 178-182.

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